SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, PETITIONERS,

vs.

E. E. BRUNER

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 9, 1944.

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[fol. 1]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

E. E. BRUNER, Plaintiff,

vs.

WILSON McCARTHY and HENRY SWAN, Trustees of the Denver & Rio Grande Western Railroad Company, a corporation, and the Denver & Rio Grande Western Railroad Company, a corporation, Defendants

COMPLAINT—Filed February 16, 1942

Plaintiff complains of defendants and for cause of action alleges:

1. That at all times herein mentioned the defendant, Denver & Rio Grande Western Railroad Company, was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and authorized to do business in the State of Utah as a foreign corporation, with its principal place of business in Utah at Salt Lake City, Utah, and that prior to the occurrence of the grievances herein complained of, the defendants, Wilson McCarthy and Henry Swan, were duly appointed trustees of all of the property of the defendant, Denver & Rio Grande Western Railroad Company, by the United States District Court for the District of Colorado in re-organization proceedings then and therein pending under the provisions of Section 77, Chapter VIII, of the Federal Bankruptcy Act, as amended, and that at all times herein mentioned all of the property of the defendant, Denver & Rio Grande Western Railroad Company, was in the possession and control of said defendant trustees, and said defendant trustees ever since their said appointment have been, and now are, operating the railroad and all of the property of the defend-
[fol. 2] ant, Denver & Rio Grande Western Railroad Company, under the orders and directions of the said United States District Court.

2. That at all times herein mentioned the defendants were acting as a common carrier by railroad and engaged in in-

terstate commerce, and the plaintiff was employed by the defendants in said interstate commerce, and the injuries to plaintiff hereinafter complained of arose in the course of, and while plaintiff and said defendants were engaged in the conduct of interstate commerce.

3. That this action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U. S. C. A. 51 et seq.

4. That at all times during the 1st day of December, 1941, and at the time of the occurrence of the grievances herein set forth, plaintiff was employed by the defendants as a hostler's helper, and was engaged in the performance of his duties under such employment in the yards of the defendant corporation at Grand Junction, in the State of Colorado. That at about 5:15 o'clock A. M. on said 1st day of December, 1941, and while the vicinity of the accident herein described was enveloped in darkness, the plaintiff was ordered by one, Charles Colosimo, who was then and there employed by the defendant as a hostler, and who was at said time and place plaintiff's immediate superior, to assist said Colosimo in servicing defendants' Engines No. 1182 and No. 1149 and moving said engines from the roundhouse and cinder pit of the defendant corporation at Grand Junction, Colorado, to the stations where they had been assigned for use in the movement and the handling of interstate commerce by defendants. That, among other things, the said Colosimo ordered plaintiff to assist him in the sanding of Engine No. 1182 and in the placing of coal in the tender of each of said engines. That said engines were at said time [fol. 3] coupled together and were being then and there operated upon tracks which ran in an easterly and westerly direction. That Engine No. 1149 was to the west and Engine No. 1182 to the east, and both engines were facing eastward and were being propelled and moved by Engine No. 1149. That said Colosimo was operating Engine No. 1149 and the plaintiff was in Engine No. 1182. That after said Colosimo had spotted Engine No. 1182 under the sand tower, and sand had been placed in the sand dome of said Engine No. 1182, the said Colosimo then and there drove and propelled said Engine No. 1149, to which Engine No. 1182 was attached and coupled, as aforesaid, westward until the tender of said Engine No. 1149 was directly underneath

a coal chute from which coal was conveyed from bins situated on the south side of said tracks to the tenders of the engines. That while coal was being placed in the tender of Engine No. 1149 by the said Colosimo, the plaintiff after checking the water level, steam pressure and fire of said Engine No. 1182, got down from the left hand side of the cab of said engine, went to the rear end of the tender of said engine and proceeded to climb up on the tender of said engine in order to reach a position from which he could by proper signals direct said Colosimo in the movements of said engines, to the end that the tender of Engine No. 1182 could be spotted under the coal chute, when the said Colosimo did suddenly and without warning and in a careless, heedless and reckless manner, cause said Engines to be moved and propelled westward, thereby and thus causing the plaintiff to lose his balance and to be thrown from the rear of the tender of Engine No. 1182 onto the rails in front of the moving wheels of said engine, and that the wheels of said Engine No. 1182 passed over the left leg of plaintiff, causing him to suffer injury and damages as herein alleged.

5. That the said defendants and each and all of them were careless, reckless and negligent at said time and place in [fol. 4] the operation and maintenance of said locomotives in the following particulars:

A. That at said time and place the defendants, acting through an agent, servant and employee, other than the plaintiff, suddenly, unexpectedly and without giving or sounding any warning, either by bell, whistle or otherwise, started said engines, thereby causing plaintiff to lose his balance and to be thrown from the rear of said Engine No. 1182 onto the rails in front of the moving wheels of said Engine, causing Plaintiff to suffer injury and damages as herein set forth.

B. That the said Colosimo, then and there acting as agent, employee and representative of the defendants, and each of them, suddenly, unexpectedly and without warning, moved said engines without knowing whether or not said engines could be moved without endangering the plaintiff, as a result whereof the plaintiff was thrown from the rear of said Engine No. 1182 onto the tracks immediately in front of the moving wheels of said Engine No. 1182, causing him to suffer injury and damage as herein set forth.

C. That at the time of the occurrence of the grievance herein set forth, and prior thereto, there existed a custom well known to and recognized and followed by all of the hostlers engaged in the movement of engines and trains in defendants' yards at Grand Junction, Colorado, and that according to said custom and practice, a hostler would never start or move an engine until he had received a signal to proceed given by the hostlers helper. That the said Colosimo, then and there acting as the agent, servant and representative of the defendants, as aforesaid, suddenly, unexpectedly and without getting any sign or signal to move said engines from the plaintiff, who was then and there the helper of said Colosimo, caused said engines to be moved westward, as a result whereof the plaintiff was thrown from the rear end of Engine No. 1182 and onto the track im- [fol. 5] mediately in front of the moving wheels of said Engine, causing him to suffer injury and damage as herein set forth.

D. That prior to the occurrence of the grievances herein set forth, to-wit, on the 1st day of January, 1938, the defendants had adopted, promulgated and published certain rules and regulations of the operating department of said defendant. That said rules were in full force and effect at all times during the first day of December, 1941, and that Section 30 thereof provided as follows:

> "The bell must be rung when an engine is about to move and while approaching and passing stations, tunnels, snow sheds and public crossing at grade."

That in violation of said rule, and without giving any warning by bell, whistle or otherwise, the said Charles Colosimo, then and there acting as the agent and servant of the defendants, as aforesaid, suddenly and unexpectedly started said engine, thereby causing plaintiff to lose his balance and to be thrown from the rear end of Engine No. 1182 and onto the track immediately in front of the moving wheels of said Engine causing him to suffer injury and damage as herein set forth.

E. That prior to the occurrence of the grievances herein set forth, to-wit, on the 1st day of December, 1938, the defendants adopted, promulgated and published certain safety rules governing employees in the operating department, and all other employees as may be required to observe said rules,

and that said rules and all of them were in full force and effect at the time of the grievances herein set forth. That one of said safety rules, namely, Section 2057, provided as follows, to-wit:

> "Engine bell or whistle warning must be given before engines are moved, then wait at least one minute."

That in violation of said rules, and without giving any warning by bell, whistle or otherwise, the said Colosimo suddenly, unexpectedly and without warning, started said engines, thereby and thus causing plaintiff to lose his [fol. 6] balance and to be thrown from the rear end of Engine No. 1182 and onto the track immediately in front of the moving wheels of said Engine No. 1182, causing plaintiff to suffer injury and damages as herein set forth.

6. That the aforesaid negligent, careless, heedless and reckless conduct on the part of the defendants acting through an agent, servant and representative other than the plaintiff herein, in the use, maintenance, management and operation of said locomotives No. 1182 and No. 1149, was and is the direct and proximate cause of the injury and damage suffered by plaintiff as herein set forth.

7. That as a result of the aforesaid acts of negligence on the part of defendants and each of them, and their agent, servant and employee other than the plaintiff, the plaintiff was rendered sick, sore, lame, disabled and disordered, both internally and externally, and received the following personal injuries, to-wit: A crushing severance of the left leg a few inches below the knee, with skin and flesh torn loose from said leg to a point near the knee, making necessary an amputation of said leg at a point approximately 5 inches below the knee. That as a result of said injuries plaintiff was caused to and did suffer extreme and excruciating pain and anguish for a long period of time, to-wit, from the time said injuries were received until the present time, and that plaintiff has been informed and believes, and therefore alleges, that he will continue to suffer extreme pain and anguish from said injuries for a long time to come. That as a result of said injuries plaintiff also suffered profound shock; that he has been permanently injured, maimed, crippled and incapacitated for life.

8. That immediately prior to the occurrence of the grievances herein set forth plaintiff was a strong able-bodied

man of thirty-one years of age, capable of earning and earning the sum of Two Hundred Fifty ($250.00) Dollars per [fol. 7] month. That by reason of the facts hereinabove set forth, and the injuries proximately caused plaintiff thereby, plaintiff is now and will be permanently incapable of performing his usual work and will never again be physically able to perform the duties incident to his occupation as a fireman, hostler or hostler's helper, or do any other kind or class of work which requires the usual and normal use of two legs and feet.

9. That by reason of the carelessness, recklessness and negligence of the defendants in the premises, as aforesaid, and as a direct and proximate result thereof, plaintiff has been generally damaged in the sum of Seventy Five Thousand and no/100 ($75,000.00) Dollars.

Wherefore: Plaintiff prays judgment against the said defendants, and each of them, in the sum of Seventy Five Thousand and no/100 ($75,000.00) Dollars, and for his costs herein expended, and for such other general relief as to the Court may seem meet and equitable in the premises.

Rawlings, Wallace & Black, Attorneys for Plaintiff,
530 Judge Building, Salt Lake City, Utah.

(Duly verified.)

In District Court of Salt Lake County

Answer of Defendant Denver and Rio Grande Western Railroad Company—Filed April 30, 1942

Comes now the defendant The Denver and Rio Grande Western Railroad Company, miscalled in this suit as the Denver and Rio Grande Western Railroad Company, and answering the complaint of the plaintiff on file herein admits, denies and alleges as follows:

1. Admits the allegations of Paragraphs 1 and 3 of said [fol. 8] complaint. Admits that defendant trustees above named were acting as a common carrier by railroad and were operating the railroad of defendant here answering in interstate commerce, and that plaintiff was employed by said defendant trustees and received personal injuries in the course of and while he and said defendant trustees were engaged in the conduct of interstate commerce. Admits

that on December 1st, 1941, plaintiff, while in the employ of defendant trustees as a hostler's helper, suffered personal injuries as a result of which a portion of plaintiff's lower left leg was severed from the remaining portion thereof and that the said injury took place at Grand Junction in the State of Colorado. Admits that prior to the happening of said accident, plaintiff was physically capable of performing the duties incident to his employment; that as a result of said accident he was physically unable to engage in his usual occupation or any other work requiring manual labor for a period of approximately three months. Admits that the rules set forth in sub-paragraphs D. and E. of Paragraph 5 of said complaint were promulgated by the defendant trustees on the dates alleged in said complaint and were in force at the time of said accident.

2. Deny generally and specifically each and every allegation contained in said complaint not hereinbefore expressly admitted.

3. Further answering said complaint, this defendant alleges that if plaintiff met with an accident or was injured as therein set forth, his failure to exercise due care for his own safety contributed thereto and was a proximate cause thereof.

Wherefore, this defendant prays that plaintiff take nothing under said complaint; that the same be dismissed; and that it have a judgment in its favor for its costs herein necessarily expended.

Van Cott, Riter & Farnsworth, Attorneys for The Denver & Rio Grande Western Railroad Company.

(Duly verified.)

[fol. 9] In District Court of Salt Lake County

Answer of Defendant Trustees—Filed April 30, 1942

Come now defendants Wilson McCarthy and Henry Swan, Trustees of the Denver and Rio Grande Western Railroad, and answering the complaint of plaintiff on file herein Admit, Deny and Allege as follows:

1. Admit the allegations of Paragraphs 1 and 3 of said complaint. Admit that defendant trustees above named

were acting as a common carrier by railroad and were operating the railroad of said The Denver and Rio Grande Western Railroad Company in interstate commerce, and that plaintiff was employed by said defendant trustees and received personal injuries in the course of and while he and said defendant trustees were engaged in the conduct of interstate commerce. Admit that on December 1st, 1941, plaintiff, while in the employ of defendant trustees as a hostler's helper, suffered personal injuries as a result of which a portion of plaintiff's lower left leg was severed from the remaining portion thereof and that the said injury took place at Grand Junction in the State of Colorado. Admit that prior to the happening of said accident, plaintiff was physically capable of performing the duties incident to his employment; that as a result of said accident he was physically unable to engage in his usual occupation or any other work requiring manual labor for a period of approximately three months. Admit that the rules set forth in subparagraphs D. and E. of Paragraph 5 of said complaint were promulgated by these defendant trustees on the dates alleged in said complaint and were in force at the time of said accident.

2. Deny generally and specifically each and every allegation contained in said complaint not hereinbefore expressly admitted.

3. Further answering said complaint, defendant trustees allege that if plaintiff met with an accident or was in- [fol. 10] jured as therein set forth, his failure to exercise due care for his own safety contributed thereto and was a proximate cause thereof.

Wherefore, defendant trustees pray that plaintiff take nothing under said complaint; that the same be dismissed; and that they have a judgment in their favor for their costs herein necessarily expended.

Van Cott, Riter & Farnsworth, Attorneys for Defendants Wilson McCarthy and Henry Swan, Trustees of The Denver & Rio Grande Western Railroad Company.

(Duly verified.)

In District Court of Salt Lake County

Verdict—Filed June 6, 1942

We, the Jurors impaneled in the above case, find the issues in favor of the plaintiff & against the defendant and assess plaintiff's damages in the sum of $30,000.

Dated June 6, 1942.

F. U. Leonard, Foreman.

(Filed June 6, 1942.)

(Title of Court and Cause)

Verdict

We, the Jurors impaneled in the above case, find the issues of negligence in favor of the plaintiff and assess his damages in the sum of $——. We find the issues of contributory negligence in favor of the defendants and reduce the plaintiff's damages in the amount of $——.

Dated June 6, 1942.

—— ——, Foreman.

(Filed June 6, 1942.)

[fol. 11] (Title of Court and Cause)

Verdict

We, the Jurors impaneled in the above case, find the issues in favor of the defendants and against the plaintiff—no cause of action.

Dated —— —, 194—.

—— ——, Foreman.

(Filed June 6, 1942.)

In District Court of Salt Lake County

Minute Entry of Trial

Entered Order, dated June 7, 1942. George A. Faust, Judge.

The jury heretofore impaneled, the respective attorneys and all necessary persons hereto being present and ready, the further trial of the within case is resumed. Comes now

Grant H. Bagley, of counsel for the defendant and moves the Court for a directed verdict in favor of the defendant and against the plaintiff—no cause of action. Said motion is submitted to the Court without argument and is by the Court denied. Whereupon the Court instructs the jury in writing and the case is argued to the Jury by respective counsel, submitted and the jury at the hour of 11:30 A. M. retires from the Court room to consider of their verdict and subsequently at the hour of 1:10 returned into open Court and said by their foreman as follows, to-wit:

> "We, the Jurors impaneled in the above case, find the issues in favor of the plaintiff and against the defendant and assess plaintiff's damages in the sum of $30,000."
>
> Dated: June 6, 1942.
>
> Signed: F. U. Leonard, Foreman.

Whereupon the jury is duly polled, each juror excepting Mrs. Denise Bintz answering in the affirmative. Thereupon the jury is excused from further consideration of the within case.

[fol. 12] In District Court of Salt Lake County

Instructions and Exceptions

Instruction No. 6

You are instructed that plaintiff cannot be charged with the duty of anticipating and avoiding negligence on the part of other employees of the defendants and that plaintiff had a right, in attempting to climb up on the tender of Engine 1182 immediately prior to the occurrence of the event complained of by him, to assume that the hostler, Colosimo, would use ordinary care to prevent injury to him and that plaintiff had a right to assume that said hostler, at said time and place, would not put Engines 1149 and 1182 in motion without first receiving from plaintiff a signal to do so or without giving plaintiff warning by bell or whistle of his intention to move said engines.

You are further instructed that plaintiff had a right to presume that Colosimo would act in a prudent, proper and careful manner, and would obey and not violate any of

the rules and regulations of the Railroad Company pertaining to the movement of its trains and engines, and the safety of its employees in force at that time.

You are further instructed that plaintiff had a right to act upon the presumption that Colosimo would do his duty, and would exercise ordinary care.

EXCEPTIONS TO INSTRUCTION TO JURY NO. 6

Defendants except to Instruction No. 6, and the whole thereof.

The defendants except to the first paragraph of Instruction No. 6 and to the whole of said paragraph.

Defendants except to the second paragraph of said Instruction No. 6, and to the whole of said paragraph.

[fol. 13] Defendants except to the third paragraph of Instruction No. 6, and to the whole of said paragraph.

INSTRUCTION NO. 9

You are instructed that in considering the element of the loss of wages and future earnings, if any, which plaintiff may sustain in the future on account of the loss of his leg, you may first consider and determine from the evidence plaintiff's expectancy of life; and second, ascertain and determine from the evidence the loss or impairment of plaintiff's earning power, if any, resulting from his injury; and, third, ascertain and determine from the evidence what interest could be fairly expected from safe investments which a person of ordinary prudence, but without particular financial experience or skill, could make in this locality.

You are further instructed that the loss of income which plaintiff may sustain in the future on account of the loss of his leg must be figured on the basis of the present value of a yearly income equivalent to the probable reduction of plaintiff's earnings, and if you shall find and believe from the evidence that plaintiff has suffered a loss and impairment of earning power resulting from his injuries, and that said injuries were caused by the negligence of the defendants as in these instructions explained, he would be entitled to receive, as compensation for such loss and impairment of future earning power, the value or equivalent of said loss and impairment of earning power if paid now in a lump sum by the defendants in advance

instead of being earned and received in monthly installments during the remaining years of his life, figured on the basis of the interest rate which you shall determine as in these instructions hereinabove set forth.

[fol. 14] EXCEPTIONS TO INSTRUCTION TO JURY No. 9

Defendants except to Instruction No. 9, and the whole thereof.

Defendants except to the first paragraph of Instruction No. 9.

Defendants except to that part of Instruction No. 9, which reads: "could make in this locality".

Defendants except to the second paragraph of Instruction No. 9, and to the whole thereof.

INSTRUCTION No. 20

You are instructed that if you find the plaintiff is entitled to recover, you may award him such damages not exceeding the sum of seventy-five thousand dollars ($75,000.00) as in your opinion will compensate him for the pecuniary damages proved to have been sustained by him and proximately caused him by the wrong complained of; and in estimating the amount of such damages you may consider the physical and mental pain suffered, if any, the nature, extent, and severity of his injury or injuries, if any, the extent, degree, and character of suffering, mental or physical, if any, its duration and its severity, and the loss of wages and future earnings and impairment of earning capacity, if any, his loss of power and capacity to work, if any, and its effect upon his future.

You may also consider whether the injury was temporary in its nature or is permanent in its character, and from all these elements you will resolve what sum will fairly compensate the plaintiff for the injury sustained.

If you find that the plaintiff is entitled to recover, the measure of his recovery is what is denominated compensatory damages; that is, such sum as will compensate him for the injury he has sustained.

[fol. 15] EXCEPTIONS TO INSTRUCTION TO JURY No. 20.

Defendants except to Instruction No. 20, and to the whole thereof.

Defendants except to that part of Instruction No. 20 which is contained in the first sentence thereof.

Defendants except to that part of Instruction No. 20 which is contained in the second paragraph thereof.

Defendants except to that part of Instruction No. 20 which is contained in the last paragraph thereof.

In District Court of Salt Lake County

Judgment on Verdict—Filed June 8, 1942

This action came on regularly for trial. The said parties appeared by their attorneys. A jury of 8 persons was regularly impaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court, and being called, answered to their names, and say they find a verdict for the plaintiff as follows, to-wit:

> "We, the Jurors impaneled in the above case, find the issues in favor of the plaintiff and against the defendant and assess plaintiff's damages in the sum of $30,000.
>
> Dated: June 6, 1942.
>
> Signed: F. U. Leonard, Foreman.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said plaintiff have and recover from defendant the sum of Thirty Thousand and no/100——($30,000)—— Dollars.

Judgment entered June 6, 1942.

[fol. 16] In District Court of Salt Lake County

Notice and Motion for a New Trial—Filed June 11, 1942

To the plaintiff above named and to his attorneys, Rawlings, Wallace and Black:

You and each of you are hereby notified that the defendants in the above entitled action intend to and do hereby separately move the court to vacate and set aside the ver-

dict of the jury and the judgment entered thereon in favor of the plaintiff and against the defendants and to grant said defendants and each of them a new trial. Said motion is and will be based upon the following grounds:

1. Irregularity in the proceedings of the court, the jury and the orders of the court and abuse of discretion by which the defendants were prevented from having a fair trial:

2. Misconduct of the jury;

3. Accident or surprise which ordinary prudence could not have guarded against;

4. Newly discovered evidence material for the defendants which they could not with reasonable diligence have discovered and produced at the trial;

5. Excessive damages, appearing to have been given under the influence of passion or prejudice;

6. Insufficiency of the evidence to justify the verdict and judgment and that they and each of them are against law;

7. Error in law occurring at the trial and excepted to by the defendants.

This motion is based upon the files and records in the case, the minutes of the court, and affidavits and evidence to be submitted at the hearing on said motion.

Van Cott, Riter & Farnsworth, Attorneys for Defendants.

[fol. 17] In District Court of Salt Lake County

Notice of Overruling of Motion for New Trial—Filed July 13, 1942

To the Defendants, Wilson McCarthy and Henry Swan, Trustees of the Denver & Rio Grande Western Railroad Company, a Corporation, and the Denver & Rio Grande Western Railroad Company, a Corporation, and to their counsel Van Cott, Riter & Farnsworth; Grant Bagley and Edgar C. Jensen:

You, and Each of You are hereby notified that defendants' motion for a new trial, which came on regularly for

hearing before the Honorable George A. Faust, one of the Judges of the above entitled Court, at his Court Room at 2:00 o'clock A. M. on Monday, July 6, 1942, was by the Court considered and duly denied and overruled.

Rawlings, Wallace & Black, Attorneys for Plaintiff, 530 Judge Building, Salt Lake City, Utah.

In District Court of Salt Lake County

Notice of Appeal—Filed October 2, 1942

To the Plaintiff Above Named and His Attorneys Messrs. Rawlings, Wallace & Black:

You and each of you will please take notice that the defendants above named and each of them do hereby appeal to the Supreme Court of the State of Utah from the judgment made and entered in the above entitled court and cause in favor of the plaintiff and against the defendants and each of them on June 8, 1942, and from the order of the court overruling and denying defendants' motion for new trial, and from the whole of said judgment and orders. This appeal is taken upon both questions of law and fact.

Van Cott, Riter & Farnsworth, Ed C. Jensen, Attorneys for defendant.

[fol. 18] Clerk's Certificate to transcript omitted in printing.

[fol. 19] In District Court of Salt Lake County

Portions of the Bill of Exceptions

Transcript on Appeal

On this 4th day of June, A. D. 1942, at 10:00 A. M., the above-entitled cause of action came on regularly for trial before the Honorable George A. Faust and a jury; the respective parties appearing by counsel as follows:

Appearances

For the Plaintiff: Rawlings, Wallace & Black, Esqs., E. E. Henderson, Esq.

For Defendants: Van Cott, Riter & Farnsworth, Esqs., E. C. Jensen, Esq. and Grant H. Bagley, Esq.

Counsel having announced that they are ready for trial, the examination of prospective jurors is commenced and carried forward until eight duly qualified jurors have been chosen and sworn for the trial of this cause.

E. E. Bruner, the plaintiff herein, was called as a witness, and being first duly sworn, testified as follows:

Direct examination.

By Mr. Black:

Q. You may state your name, please.
A. E. E. Bruner.
Q. Your first name is Everett?
A. Yes.
Q. You are the plaintiff in this case?
A. Yes sir.
Q. You now reside in Albuquerque, New Mexico?
—. ——.
Q. Where do you live?
A. Albuquerque, New Mexico.
Q. How long have you lived there?
A. About three months.
Q. How old are you, Mr. Bruner?
A. Thirty-one.
[fol. 20] Q. When was your last birthday?
A. July 12, 1941, last year. I was thirty-one in '41.
Q. Prior to this accident you complain about, what was your occupation?
A. I was hired as a fireman on The Denver & Rio Grande Railroad. I was working as a hostler's helper.
Q. When did you go to work for The Denver & Rio Grande?
A. September 7, 1941.
Q. September 7, 1941?
A. That is when my seniority date started, was September 7th.

By the Court:

Q. What year?
A. 1941.

By Mr. Black:

Q. Prior to coming to work for The Denver & Rio Grande, had you been employed?

A. I was working for the Denver & Salt Lake Railroad, I went to work for the company in 1929, and worked on various jobs, started out as a laborer, boiler washer, machinist's helper, hostler's helper, and in a job where I was hostler for better than six years, or going on six years, I went to work as a hostler for the Denver & Salt Lake February 15, 1935, I believe it was, or '36.

Q. You were hostler there for some years?

A. Yes, for going on six years.

Q. You may state whether or not you were ever employed as a fireman by the Denver & Salt Lake?

A. I have made trips on there, but I was working as a fixed hostler at the time. I did make trips as a fireman, but I did not have seniority date as a fireman, but I performed the duties.

Q. How old were you when you went to work for the Denver & Salt Lake?

A. I was eighteen.

Q. Have you worked at any other occupation or trade since you were eighteen, except employment as a hostler or a hostler's helper?

A. That is all, excepting a little fireman work here and there. I was never employed in anything else outside of the railroad.

Q. How much education did you have?

A. I was in the 7th grade.

[fol. 21] Q. When you went to work for The Denver & Rio Grande last September, you may state whether or not you took any examination?

A. Yes, I took the examination on the Book of Rules, operating rules, also a physical examination, and passed them okeh.

Q. Did you qualify for any particular position as a result of this examination?

A. I qualified for fireman. Of course, the firemen perform the duties of hostler and hostler's helper; I was hired as a fireman.

Q. You were hired as a fireman?

A. Yes.

Q. Where did you take that examination?

A. At Grand Junction, Colorado.

Q. You may state whether that examination was given by officials or employes of The Denver & Rio Grande Railroad?

A. Yes; the assistant superintendent was there, Mr. Blackwell, and one of their examiners, I forget his name. I have it on my card.

Q. Will you refer to the card and tell us that name?

A. I passed the examination—It was by the company.

Q. It was after this examination that you were employed?

A. Yes.

Q. What was the rate of pay for the work you performed under that employment?

A. At that time, before the raise—of course, it was in effect and we got back pay for the work that was done, but at that time the hostler's helper was getting $5.51 for eight hours, and the hostler was $6.71, and the firemen ranged according to the class of engine up as high as $8.42. You can figure a seventy-six cents a day raise on all these figures.

Mr. Black: I don't believe the jury got that, because you were going pretty fast.

Q. What was the rate of pay when you commenced to work as a hostler's helper?

A. $5.51 for eight hours.

Q. $5.51 for eight hours?

A. Yes sir.

Q. And hostler?

A. $6.71 for eight hours, an outside hostler.

[fol. 22] Q. $6.71?

A. Yes sir.

Q. And firemen?

A. They range according to the class of engine, various rates.

Q. How are those engines classified?

A. According to the weight on drivers. They get different rates of pay, depending on the tonnage they pull; like 600 Class A, $8.42 at that time, for one hundred miles. That is the same as eight hours. One hundred miles is the same as eight hours.

Q. How much was that?

A. $8.42.

Q. $8.42 for one hundred miles or eight hours?

A. Yes.

Q. What about the next class?

A. I would have to see the book, I don't know exactly. I can't memorize each class of engine, anywhere from six dollars, $6.20, or something like that, on up, for the small class of engines; the switch engine was paid a little over six dollars for eight hours.

Q. $6.20 and on up?

A. Yes.

Q. Is $8.42 the top?

A. I believe that was tops at that time.

Q. Those rates were raised, were they not?

A. Seventy-six cents per day for all of them.

Q. When were those rates raised?

A. I don't remember the date it went into effect. I believe it went into effect along in the summer sometime, or early fall; that is, we got back pay for that work.

Q. Do you know whether or not the raise was in effect at the time of your injury?

A. They were still in conference over it, but we got paid for the time I was injured. We got back pay for that work.

Q. That pay was seventy-six cents a day?

A. A raise of seventy-six cents a day on all classes.

Q. A raise of seventy-six cents a day on all classes?

A. Yes.

[fol. 23] Q. After you went to work for The Denver & Rio Grande, how many days a week were you employed?

A. I was working most every day, excepting I missed a call once or twice, then I laid off for a while. I missed some days, but I could have been working every day had I been there to work.

Q. What would you say your average income was from your employment there between the 7th of September and the time you were injured?

A. I lost considerable time there in October, so that knocked the average down. I know one month my check amounted to close to $240.00 for the month; my earnings that is; but, of course, with the time that I lost, that would naturally take the average down. I would probably average around two hundred dollars, I would say.

Q. Average around two hundred?

A. Yes. I have never averaged it up, but had I worked all the time I could have, it would be around that.

Q. What was the nature of your employment by the defendant corporation, after you went to work September 7, 1941?

A. I made several trips as a fireman, and several shifts working as a hostler, and a good many shifts when I was working as a hostler's helper.

Q. Were you examined as a hostler before you went to work?

A. They qualified me for hostler, that is, they called me as a hostler. They called me to go to take the hostler's job; so I was qualified here by one of the officials.

Q. So you were qualified as a hostler and a hostler's helper?

A. Yes.

Q. Under that examination?

A. Yes.

Q. What are the types of hostlers that are employed by the defendant at the yards at Grand Junction?

A. The inside hostler is the one that gets the engine out of the roundhouse. That is, he does not go to the main line. The main line hostlers bring the engines from the main line or out in the yards to the round house, the yards out there, where the coal chutes, the sand house, and so forth, are. He brings them over there, and the inside hostler, after they have been serviced, the inside hostler will take them to the roundhouse, but the inside hostlers do not go to the main line, the outside do. They help around the roundhouse and go to the main line whenever it is needed.

Q. When engines are recovered from service?

A. If they do not want them at the roundhouse they take them to the inspection pit.

[fol. 24] Q. Who takes them there?

A. The outside hostlers.

Q. The outside hostlers take the engines for service from the cinder pit?

A. Yes. Sometimes the inside hostlers will bring them as far as the roundhouse, sometimes the outside hostlers will bring them down to the cinder pit. We, as a rule, take them from there. The outside hostlers place them on their outgoing track and wait after the crew has fueled them, to

be delivered to the depot or wherever the hostlers tell them where they have to be delivered to.

Q. To whom do the outside hostlers deliver engines to, before delivering from service in the yard?

A. They bring them, as a rule, to the inspection pit and leave them there at the inspection pit, and the inside hostler, after they have been washed—they have to stop to wash them. Some of them clean the fire coming in; some they pass up, but they run them on up toward the roundhouse, and the inside hostler takes them from there, as a rule. Sometimes the outside hostler will deliver them clear up.

Q. From whom do the outside hostlers receive engines that are assigned to duty?

A. The outside hostlers, they will receive them, as a rule, from the inside hostler. He will get them outside of the roundhouse, and then the outside hostlers take them and finish getting them ready to go, and put them wherever they are needed. However, going out to wait for the crew, once in a while the outside hostler will go into the roundhouse and get an engine, but it is the inside hostler's duty to bring them out of the roundhouse.

Q. Do the hostlers have any duties to perform with any of the equipment except engines?

A. Outside, taking sand from the sand spout.

Q. I mean, are the hostlers assigned to duty in connection with any other kind of equipment except engines?

A. No.

Q. Any other cars?

A. No, just engines; outside of auxiliary water cars. We have to handle auxiliary water cars, but they are in connection with the engines. They are coupled right to them. On some classes of engines they use an auxiliary water car, but nothing used in freight service are handled.

Q. How many hostlers are usually employed by the company at Grand Junction?

A. They have regular class, I believe, two, three and four, of the outside hostlers, and one inside hostler, dependent on the business. Sometimes they call in extra hostlers; if there is too much business for the ones there they will call extra hostlers when it gets a rush.

[fol. 25] Q. These extra hostlers that are usually called, are they outside hostlers?

A. Yes.

Q. So the extra hostlers are very seldom inside hostlers?

A. Very seldom. Once in a while they will have two, but it is very seldom.

Q. While you were employed by the defendant company at Grand Junction, did you ever serve as an inside hostler?

A. Yes, I served as an inside hostler, and an outside hostler, also.

Q. And also as hostler's helper?

A. Yes.

Q. Mr. Bruner, I believe that the last question before the recess was as to whether or not you had ever served as an inside hostler?

A. Yes, I did.

Q. You may state whether or not you had served as a hostler's helper with the various regular hostlers employed at the yards at Grand Junction?

A. I had served with several hostlers at Grand Junction all right, but this happened to be the first shift I worked with Mr. Colosimo.

Q. How long had you known Mr. Colosimo before the shift beginning at eleven o'clock on the 30th day of November?

A. I did not know him personally; just from seeing him on the job from time to time. So far as knowing him personally, I did not know the gentleman, I had just seen him on the works now and then. So far as having any acquaintance, I did not know him outside of just what short time I had worked there and seen him from time to time.

Q. I think you stated heretofore that during the period of time that you were employed by the defendant company you had served both as hostler and hostler's helper?

A. Yes sir.

Q. And that before your engagement by the defendant company you had worked as a hostler for some years?

A. Yes sir.

Q. Do you know what the duties of a hostler consisted of, that is, the hostlers employed by the defendant company in the yards at Grand Junction?

A. Yes sir.

Q. Will you state in detail what the duties of an outside hostler were?

[fol. 26] A. An outside hostler, his duties are to see if the engines are called, to get them ready, to take sand, see that the sand is okeh; if they need any, take them to the sand box; also water in the tank, and coal, see that they have plenty of coal; place them where they want them placed for getting out; and the engines that have finished their day's work; that is, over in the yard, you have to go to the yards to get the engines, to bring them over to the roundhouse, and you place them, if they want them on the inspection pit you place them there. Sometimes you will coal them up, as they are coming in or out they have to have coal and sent on. When they are going out they have to be checked; but it is all in the handling of the engines, you have to take care of them, to the cinder pits, and so forth.

Q. Does the hostler have anything to do with the operation of the engine?

A. The hostler handles the engine, he is the one who puts it in motion.

Q. What are the duties of a hostler's helper?

A. The hostler's helper lines switches, if there are any to be lined, takes the sand, if there is sand to be taken at the spout, and give them the proper signals to spout that and take the sand or coal or water, or whatever happens to be needed; the hostler's helper does that, and lines the switches and gives the signals to operate on if there are any switches to be throwed.

Q. Will you just tell the jury how the hostler and hostler's helper work together in moving the engine during the engine's recovery, after the run of an engine, to be taken from the place where the inside hostler delivers it to the place where it is to be placed in operation?

A. The hostler will give you the line up, wherever the engine is to be taken to, if it is from the yards to the roundhouse or service tracks he tells you what track it has to go to, and the hostler gives the signals to move on and line the switches. The hostler's helper has to line the switches. Of coures, the hostler tells you which way you have to go, but it is up to the hostler's helper to see that the switches are lined.

Q. Just what do you mean by that statement, please?

(First part of last answer read.)

A. If you have to go to one track and another, for instance, if the engine is to be coaled he would tell you that he has to take coal on such and such an engine, put it on whatever track he decided on, whatever work he wanted done he would tell the hostler's helper to proceed in doing that work.

Q. You mentioned in your answer that the hostler's helper gave signals. Just tell the jury about that, please.

A. If you want to go forward, you give them a signal to go forward. It is a lantern up and down, at night. If you want them to back up you give a back-up signal, which is around. If you want them to stop, you go straight across, that is the stop signal. Of course, you give the signal when you are ready for the engine to be moved, the hostler's [fol. 27] helper will give the signal to be moved. Then, of course, wherever you are going to, if you go to a switch, when you have to stop you give the proper signal to stop. When you get the switch throwed, you come back and give the signal to throw the switch or go ahead, and after the switch has been throwed; we operate in that way.

Q. So the hostler's helper gives the signals, and the hostler operates the engine?

A. That is correct.

Q. Are you acquainted with the practice as followed by the hostlers and the hostler's helpers in the yards of the defendant company at Grand Junction during the months that you worked there, with respect to the moving of the engines?

A. So far as the ones that I have worked with. Yes.

By Mr. Black:

Q. Will you state what that practice was?

A. Whenever it is to be moved they get a proper signal to move and then give the signal to warn anybody that the engine is to be moved, either whistle or bell, it is usually the whistle around there. After they get the signal, that is, from the hostler's helper, they will give the proper signal from the engine that it is about to be moved.

Q. What happens, according to this custom and practice, after the hostler's helper gives the signal?

A. The hostler will give whatever signal you have given him. If you have given him a Go-Ahead signal, he will

whistle twice; if he is going to back up, it is three times, if you are going to back.

Q. According to this system and practice which was followed there in the yards at Grand Junction while you were employed by the company, did the hostler ever give any signals or signs to the hostler's helper concerning the movement of engines?

A. They generally just tell you what moves they want to be done. They will tell you what moves they want done. Of course, when you are ready to make the move you will give the hostler the signal, and he will signal back with the whistle, and acknowledge it.

Q. That is what I want to know. Under what circumstances would the hostler signal back with the whistle?

A. If it is a back-up signal, if I give a back-up signal, he would whistle three times, that is the back-up signal. That is reached by giving a back-up signal, he will whistle three times before he starts.

Q. What is the purpose of that signal?

A. That is to back up, that is whichever way the engine is headed. If you give a back-up signal it means we will start backwards, whatever way the engine is headed, it starts backwards.

[fol. 28] Q. What about a forward movement?

A. A forward motion is up and down with your lantern, and he will answer by two whistles. That is the go-ahead signal, that the engine is about to move forward—two whistles.

Q. Do you know whether or not these signals both from the hostler to the helper and the helper to the hostler, were used in the movement of engines in the yard at Grand Junction, during the time you were working there?

A. Yes, they were in effect, I always used them and worked by them.

Q. Prior to the time this accident occurred, do you recall any occasion when the signals were not used?

A. No, I don't. I always worked according to signals, that is what we have to move by, is signals.

Q. Are you acquainted with the safety rules that have been promulgated and followed by the defendant company in the operation of its business at Grand Junction, from the time you were employed there?

A. Yes sir.

Q. Do you know whether or not there were any rules with respect to the movement of engines?

A. Yes, there was. It states——

Q. You say there were rules?

A. Yes.

Q. Are you acquainted with the rule which has been mentioned here?

A. Yes sir.

Q. Were you acquainted with it at the time this accident occurred?

A. Yes, sir.

Q. You were acquainted with the rule on this occasion?

A. Yes sir.

Q. Mr. Bruner, what time did you go to work on the night of November 30, 1941?

A. At eleven P. M.

Q. When was that shift supposed to end?

A. At seven A. M., the following morning.

Q. Seven A. M.?

A. Yes sir.

Q. When were you assigned to that particular shift?

[fol. 29] A. That was the first night I had worked on it, was that particular night, that shift. That night, I went to work on that night. I had not been on it prior to that, outside of maybe catching it off the extra board, or something like that.

Q. Just how were you assigned?

A. I was in the engine dispatcher's office, and he figured that the outside hostler job would be open for the next day, and he wanted to know if I would take that 11:00 o'clock shift, and go on that hostling job the next day, if it proved to be vacant, and he asked me if I would take that 11:00 o'clock shift, in order to not discommode the plans there.

Q. So you had not been regularly on an engine as a hostler's helper up to that time?

A. No.

Q. During the night shift, while the hostler and hostler's helper work together, during the night shift, what is the usual equipment that a hostler's helper has?

A. He has an electric lantern to give signals with, which I had.

Q. Describe that lantern to the jury?

A. It is a lantern with an ordinary handle on, with a battery, a square battery that is inside of the body of the lantern, with a rim at the bottom of it; especially for giving signals. The trainmen all use them for the purpose of giving signals, a regular electric lantern for that purpose.

Q. Any colored lens?

A. It is a white light, just the bulb, the white light.

Q. Does the hostler's helper use the lantern except to give signals?

A. That is the main purpose. Of course, you have it with you at all times. It is for giving signals, and whatever you need to see with. They do not give too much light for seeing objects. Their main purpose is for giving signals.

Q. Who was the hostler that you were assigned to work with?

A. Mr. Charles Colosimo.

Q. This was the first night you worked with him?

A. That is right, the first shift.

Q. The hostler crew consists of the hostler and helper?

A. Yes sir.

Q. Who is the boss?

A. The hostler, always, with the hostler helper. The hostler helper has to do whatever the hostler tells him to do. [fol. 30] Q. You may state whether or not you worked under the direction of Mr. Colosimo during this shift?

A. Yes, whatever he told me to do, that is what I did, and my business to do.

Q. What was the nature of the work you did during the part of the shift up until the time of the accident?

A. We were handling various engines, whichever ones happened to be handled to and from the roundhouse, from the roundhouse to the water tank, or whatever work happened to come up at that time to be performed. At the time, though, we had this 1149 at the cinder pit, the inside hostler brought the 1182 out and coupled it.

Q. We will come to that later. During the shift, up until the time of the accident, you may state whether or not you had occasion to give any particular signals to Mr. Colosimo.

A. Oh yes, we are always in the operating of engines, whenever we move an engine I always give a signal, so they will know you are ready to move, wherever you happen to be going, there is a signal to stop or go to another track,

whatever moves have to be done, I give the proper signals for the proper moves.

Q. Did you give the signals even though you knew where the engine was to be taken to?

A. Yes, you have to give the signal to go, that you are ready to make that particular move, whatever it happened to be.

Q. Is there anything unusual in moving two engines at the same time?

A. No, that is very frequently done, every day I would say.

Q. Have you ever had occasion to handle more than two engines?

A. There have been occasions, yes, I have handled, myself, more than two. I have handled two and three and sometimes four at a time.

Q. In the usual course of business there, how did you handle two engines, when two engines were to be moved at the same time?

A. You couple them together and have the brakes released on the front engine, and handle it with the leading engine, whichever way you are going, you get on it and handle it with the brakes; release the brakes on all the others and handle it with the one engine.

Q. If two engines are coupled together, both facing toward the east, how would a movement to the west be accomplished?

A. You would go on the engine towards the west, if you are going towards the west, if he is going to move the engine that way, he would be toward the west.

Q. In this case who would that be?

A. Mr. Colosimo, on 1149.

[fol. 31] Q. Where would the helper be?

A. Wherever his work was to be, he would be wherever he had to be to give the signals so they would be seen.

Q. Now, Mr. Bruner, are you familiar with the tracks in the yards at Grand Junction, in the neighborhood of the cinder pit and the sand house and the coal chute?

A. Yes.

Q. Will you describe those tracks to the jury, please?

A. There are two tracks, one on each side of the coal chute. There is one on the side of the coal chute, one on the track north of the coal chute that will take coal from

either track, then up toward the roundhouse, over there, there is the sand house where you can take sand for the engines.

Q. What directions do these tracks run that you described?

A. They run east and west. The cinder pit is closest to the roundhouse, then comes the sand house on this track that is north of the coal chute, and then the coal chute is on towards the west end, from the sand house.

Q. I wonder, Mr. Bruner, if you could go to the board there and draw some tracks there.

—. —.

Q. Mr. Bruner, we have drawn three sets of parallel lines on the board, and the directions north, west, south and east are indicated. Will you take the chalk now, and indicate the best you can—assuming here, for the purpose of the drawing, that the set of tracks, the parallel lines toward the top, are the set of tracks that go to the north of the coal chute, and the bottom set is the set of tracks that go to the south of the coal chute; will you locate, as best you can, where the coal chute is?

A. The way you can see, if this was the tracks opposite the coal chute, the coal chute is set right in here, they can take coal on this side, or going here to the inspection pit it would be running this way to the roundhouse, and they could take coal on this side also.

Q. All right, let us draw the coal chute.

A. Are you going to have this for the track the coal car set on?

Q. Yes. That is a rather large coal chute there. We are going to have difficulty getting all these parts in.

Now, Mr. Bruner, I believe you stated that there were chutes that carried the coal from the coal chute to the tracks to the north and also to the south?

A. Yes.

Q. So engines could be spotted under those chutes there on the tracks to the south or north?

A. Yes.

[fol. 32] Q. And take coal from either of them?

A. Yes.

Q. To the east of the coal chute there is the sand house?

A. Yes sir.

Q. About how far is it from the coal chute to the sand house?

A. I have not measured it. I would guess it would be around two hundred feet—possibly more or less.

Q. Is the sand house between the tracks that lead to the coal chute?

A. On this side.

Q. The north side?

A. There is also a track goes there (indicating).

Q. The sand house?

A. This track here.

Mr. Black: Your Honor, we will mark that "S.H."—"Sand House".

Q. Now, there is the spout that comes out from the sand house?

A. Yes.

Q. Will you indicate that?

A. (Witness indicates.)

Q. Is that sand house built up on the trestles, the trestle work?

A. Yes, it is built high enough so through gravity the sand will run in.

Q. How far is it from the sand house to the cinder pit?

A. I don't think it is over fifty or sixty feet—maybe seventy; I don't know the exact distance.

Q. Is the cinder pit located between the tracks?

A. Yes, that is where they check the cars.

By Mr. Bagley:

Q. Between the rails?

A. Yes.

By Mr. Black:

Q. Right between the rails?

A. Yes.

Q. Is that a fair illustration of the location of the coal chute and the sand house and the cinder pit?

A. It is not very good. Of course, the sand house to the cinder pit is not as close as to the coal chute. It is farther from the sand house to the coal chute than from the sand house to the cinder pit.

[fol. 33] Q. About how far is it from the sand house to the cinder pit?

A. It must be around two hundred fifty to three hundred feet.

Q. Two hundred fifty to three hundred feet?

A. That would be my guess. It could be more or less.

Q. Calling your attention to a time shortly before the accident, you may state whether or not you were at the cinder pit?

A. Yes, we were at the cinder pit with 1149, and the inside hostler brought the engine 1182 out, and hooked it to 1149.

Q. Which direction was 1149 facing?

A. They were both facing east.

Q. Where did you pick up Engine 1149?

A. We brought it down from up by the roundhouse.

Q. You and Colosimo?

A. Yes.

Q. Did you stop at the cinder pit?

A. Yes, we stopped at the cinder pit for the purpose of the fire being cleaned.

Q. Who cleans the fire?

A. They have laborers there that do that job, they are assigned to that work.

Q. What happened to Engine 1182 after it was brought to the cinder pit?

A. They put it on the pit, too, to clean the fire on it, also. We were just waiting for them to get through cleaning the fire before we took the engines on.

Q. After the fires were cleaned on these engines, what did you do?

A. Of course, Mr. Colosimo instructed me for the next move. Of course, I just went out on the running board and gave him the back-up signal.

Q. You were out on the running board—what running board?

A. On the 1182. That was the front engine. Mr. Colosimo was on the back engine, because, prior to that, he had come up to Engine 1182 and told me that I would have to take sand on the Engine 1182; that both engines needed coal, and he would coal on Engine 1149, and for me to take coal on 1182. Then, when we got ready to leave, after the fire was cleaned, I went out on the running board, through the cab on the running board of Engine 1182.

Q. Just describe this running board to the jury, please? [fol. 34] A. It is an iron running board, the size of the boiler of the engine. It runs from the cab forward. You can walk on it. It is approximately that wide (indicating).

By Mr. Jensen:

Q. Would you say eighteen inches?

A. Yes, they are, some of them. They are about from sixteen inches, or more or less, they are wide enough for walking on. All engines do not have the same width running boards, but they are all made for the purpose of walking on.

By Mr. Black:

Q. This running board runs lengthwise from the window of the cab to the front of the engine?

A. Yes sir. I went out onto the running board of Engine 1182, in order to spot to take sand, and also to give the signal to back up, to let him know the fire was clean and we were ready to move. I spotted at the sand house.

Q. Wait a minute. Where was Colosimo when you were on the running board?

A. He was on Engine 1149.

Q. On which side of the engine were you?

A. On the right-hand side.

Q. You were on the south side?

A. Yes.

Q. The engineer's side would be on the south side of the engine, when it was facing that way?

A. Yes.

Q. So you were on the south side of the engine?

A. Yes.

Q. And Colosimo was back in the cab of the other engine?

A. Yes.

Q. What did you do?

A. I gave him the back-up signal, to back up to the sand house.

Q. How did you give him that signal?

A. Just a back-up signal, around with the arm, with the lantern; that is, the back-up signal.

Q. Then what happened?

A. He proceeded on back to where I gave him the stop signal to take sand on Engine 1182. I spotted it for sand.

I stopped him at the sand house. He stopped there when I gave him a stop signal.

Q. By the way, it was dark at that time?

A. Yes, it was dark.

[fol. 35] Q. The sand house is on the north side of the tracks?

A. Yes.

Q. How did you get hold of the sand spout?

A. You have to get on top of the engine, and they have a rope that comes down for the purpose of pulling the spout down. Then you pull the spout down in order to take the sand. There is another rope to pull there that opens the valve to let the sand out.

Q. You got on top of the engine to lower the sand spout to the engine?

A. Yes.

Q. What did you do after you got the sand in 1182?

A. I got back to the running board and gave him a back-up signal.

Q. Which running board?

A. The right-hand side, the south side of the engine. I gave him a back-up signal, so he knew we were through with taking the sand, and he proceeded on back.

Q. Of course, all the time 1149 was to the west of you?

A. Yes.

Q. You told the jury before you left the cinder pit you knew you were going to take coal on both engines?

A. Yes.

Q. What did you do after the engines were placed in motion, after sand was taken in 1182?

A. I went back into 1182, and checked the fire, to see that it was catching up. After they shake it it is slow to catch up. I checked it to see if there was plenty of air, and shut the blower off. The fire was catching up, so I shut the blower off to keep it from popping off. With the fire going it would blow up to where it would pop off. I shut the blower off also.

Q. Do you recall when the engines stopped there in the vicinity of the coal chute?

A. I figured that he had spotted his engine to take coal. It would be in that vicinity, yes.

Q. What did you do when the engine stopped?

A. I got on down to the ground and went to the rear end of the engine.

Q. By the way, which side of the engine did you get off?

A. I got off on the north side.

Q. You got off on the north side?

A. Yes sir.

[fol. 36] Q. Was there any reason for getting off on the north side? You got off on the north side?

A. Yes.

Q. What did you do?

A. I went to the rear end of the tank. We have a ladder on the rear end of the tank, to get up on. I went to the rear end of the tank of 1182, in order to get up on the tank, to take coal, to spot for coal and to take coal.

Q. Just a minute. When these engines stopped the first time at the coal chute, did you give any signal?

A. Not to stop, no.

Q. Why didn't you?

A. Because Mr. Colosimo had stated or told me that he would take the coal on his; that I did not have to go back there; that he would take the coal on that engine.

Q. On 1149?

A. Yes. Therefore, it was up to him to stop wherever he wanted to on that. I did not have anything to do with that particular stop. That was up to him, as long as he was going to do the work, taking coal.

Q. Mr. Bruner, I show you a photograph marked for identification as Plaintiff's Exhibit "A". Will you examine the photograph and state whether or not you recognize the rear of the engine as shown there?

A. Yes sir, that looks like the engine, identically.

Q. That is the rear end of the engine, 1182?

A. Yes sir.

Q. That is a fair likeness, as it was then?

A. It is a fair likeness as it was then.

Mr. Black: We offer in evidence, your Honor, Exhibit "A".

Mr. Jensen: No objection.

The Court: It may be received.

EXHIBIT "A"

(Here follows 1 photograph Exhibit "A")

NT152

(Exhibit submitted to the jury.)

By Mr. Black:

Q. Mr. Bruner, I show you a large photograph, marked for identification as Plaintiff's Exhibit "B". Do you recognize the scene that is shown in the photograph?

A. Yes sir, that is the sand house and the coal chute.

Q. I call your attention here to the tank, on the tower at the right of the center; is that the sand house?

A. That is where they dry the sand, and they blow it up into there for the purpose of putting it into the engine from there by gravity. This is the sand house; this is where they blow the dry sand up.

[fol. 37] Q. Into the tank?

A. Yes.

Q. I notice a spout that comes out over the rails that are here in the foreground of the picture. Is that the spout you mentioned?

A. Yes, that is the spout you have to pull down in order to take your sand.

Q. This is the track shown here, running east and west?

A. Yes.

Q. And the bottom would be toward the east; the back toward the west?

A. Yes sir.

Q. And the right side to the north, and the left side to the south?

A. Yes sir. The tracks over here are to the south of the coal chute.

Q. Is this a fair likeness of the tracks and the sand house and the coal chute?

A. Yes sir, that is very good.

Q. A very good likeness?

A. Yes.

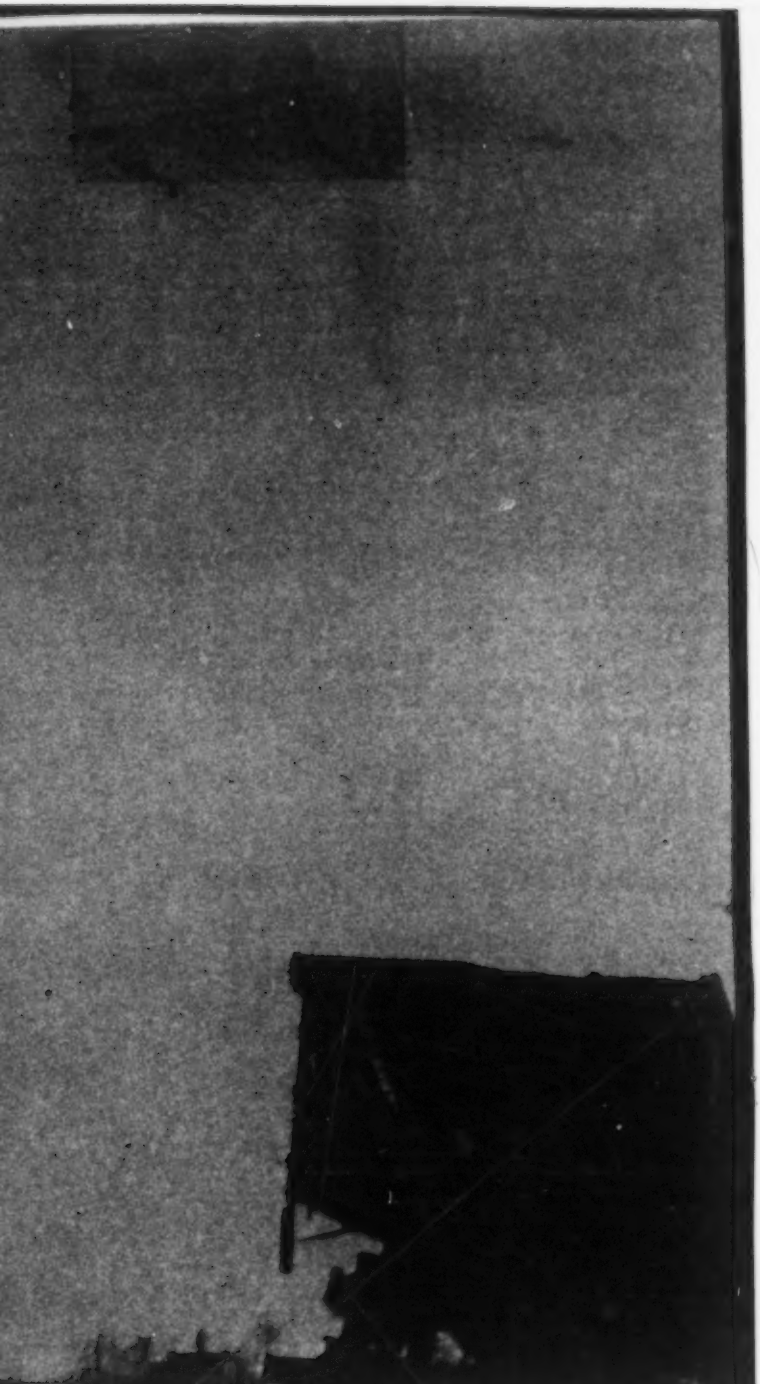
Mr. Black: We offer in evidence Exhibit "B".

Mr. Jensen: We have no objection.

The Court: It may be admitted.

EXHIBIT "B"

(Here follows 1 photograph, Exhibit "B")



(Exhibit "B" submitted to the jury.)

Q. Mr. Bruner, I call your attention to Exhibit "A", will you describe to the jury these—what appear to me to be steps on the rear end?

A. Yes, they are steps; at the bottom of the picture here are steps made for the purpose of riding on, when they are in switching service. They are approximately ten to twelve inches wide on the bottom here—for the purpose of riding on them and stepping on them.

Q. About how wide is that step?

A. In width about ten or twelve inches, I would say.

Q. I call your attention to this. Is that a handhold or step, this iron?

A. That is what they call a grabiron. It is a step or a safety appliance. It is what is known as a grab-iron.

[fol. 38] Q. The iron that runs across the rear end of the engine, above that, what is that?

A. That is also a grab-iron, what is called a grab-iron. It is known as a grab-iron.

Q. So when the brakeman or hostler's helper, or whoever has occasion to be there, they stand on the step and hold this upper iron?

A. Yes; when there is need for it they can hold to that. In switching service, they hang onto that.

The Court: Can the jury hear the witness all right?

(Answers of "Yes".)

By Mr. Black:

Q. Will you describe the tender, that is a part of the engine, I assume, attached to it?

A. That is the rear end of the tender there. That is for the purpose of carrying water and coal. The water is in the back end, and also part is where the manhole is. There is the manhole. The head of that is where you put the coal, toward the cab of the engine; that is where you put the coal, that is a part of the engine, of course.

Q. That manhole is back toward the cab?

A. Yes, they pull the coal chute down. It is open. After you get on top of the tank, or the tender here, that is where you take the water. It is about three feet from the rear of the tank, which, of course, has a lid on it.

Q. Tell the jury how you go about the coaling of this engine?

A. You have to be up on the tender, at the proper spot, pull the apron down, that runs from the coal chute up to where it will drop the coal right on the engine. There is another chain to pull, which opens the coal chute, to let the coal out. When you get the coal you want, you let go of your chain.

Q. I call your attention to Exhibit "B", and ask you if these are the coal chutes protruding outward?

A. That is the apron, what they call the apron, that they pull down for the purpose of taking coal. When they are pulled down in a slanting position it fits, to let the coal out.

Q. You pull the chute down?

A. Yes, to the slant, so the coal will slide out.

Q. Then you open the apron?

A. You open the coal chute. This is the apron. You pull this down to the slant. You have another chain to pull to open up the opening in the coal chute, to let the coal out. Then it slides on to the apron into the engine.

Q. You pull this down and it goes by gravity?

A. Yes sir.

[fol. 39] Q. Into the tender?

A. Yes sir.

Q. I call your attention to a ladder that appears on the right of Exhibit "A".

A. Yes sir.

Q. What is that used for?

A. That is for going on top of the tank.

Q. That is for going up on top of the tank?

A. Yes sir.

Q. I show you, Mr. Bruner, two photographs marked for identification Plaintiff's Exhibits "C" and "D". Will you examine the photographs and see if you recognize the scenes shown there?

A. Yes, I do.

Q. Calling your attention now directly to Exhibit "C", will you tell the jury what that shows?

A. This shows looking east from the west side of the coal chute.

Q. Looking east from the west side of the coal chute?

A. Yes sir.

Q. The coal chute being on the south side of the track?

A. Yes.

Q. You see the sand house there?
A. Yes, this is the sand house over here, and just beyond that is the cinder pit.
Q. Is that a fair likeness of what you say is shown there?
A. Yes.
Q. I call your attention to Exhibit "D", and ask you if you recognize the scene which appears there?
A. Yes, sir, this is the coal chute, looking west.
Q. Looking west?
A. Yes, with the neighborhood of the sand house.

By Mr. Jensen:

Q. Is this Grand Junction?
A. Grand Junction, yes sir.

Mr. Black: We offer these exhibits in evidence.

By Mr. Jensen:

Q. You say Exhibit "D" looks west and "C" looks east? The one showing the sand dome is toward the east?
A. Yes.

[fol. 40] Mr. Jensen: We have no objection.
The Court: Admitted.

By Mr. Black:

Q. I show you, Mr. Bruner, an enlarged photograph marked for identification plaintiff's Exhibit "E". Do you recognize the scene that is shown here?
A. Yes. This shows the cinder pit, first, right there in the center of the track, where they dump the cinders out of the ash pan.
Q. There is some smoke arising?
A. Yes, there are lots of times hot ashes. They wet them with water. They will steam. This is the cinder pit, then the sand house; then the center, showing looking west.
Q. Is this a fair likeness?
A. It is very good, very good. (Repeated)
Q. The engine that appears here is also headed west?
A. Yes sir.

Mr. Black: We offer in evidence, your Honor, the exhibit. (Exhibit "E")

Mr. Bagley: You don't make any claim, of course that the engine shown in this picture is either one of the engines involved in this case?

Mr. Black: No, we make no claim about that, whatsoever. We claim nothing for it except it is an engine there headed toward the west.

The Court: It may be admitted.

(Here follows 1 photolithograph, Exhibit "E")

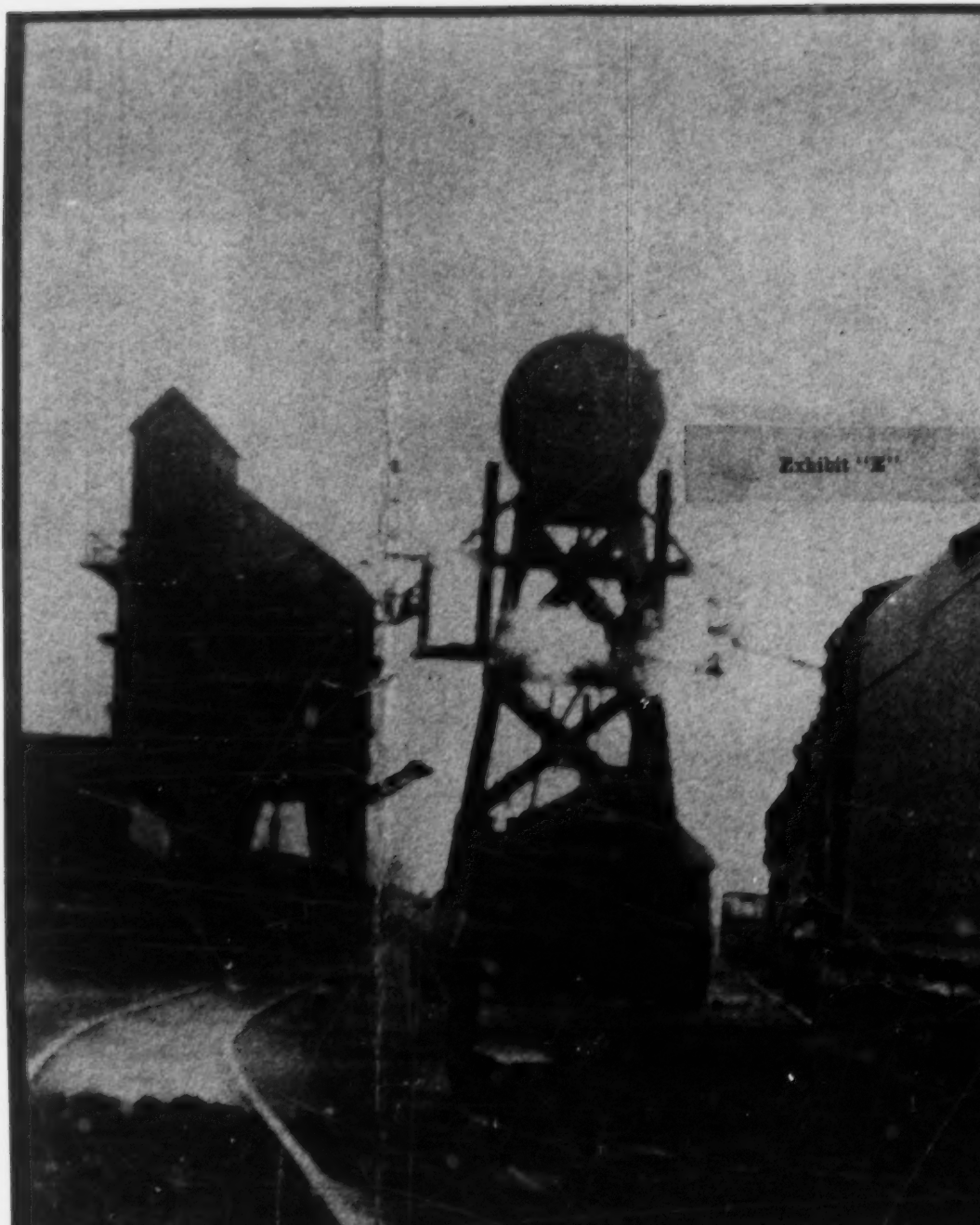


Exhibit "E"

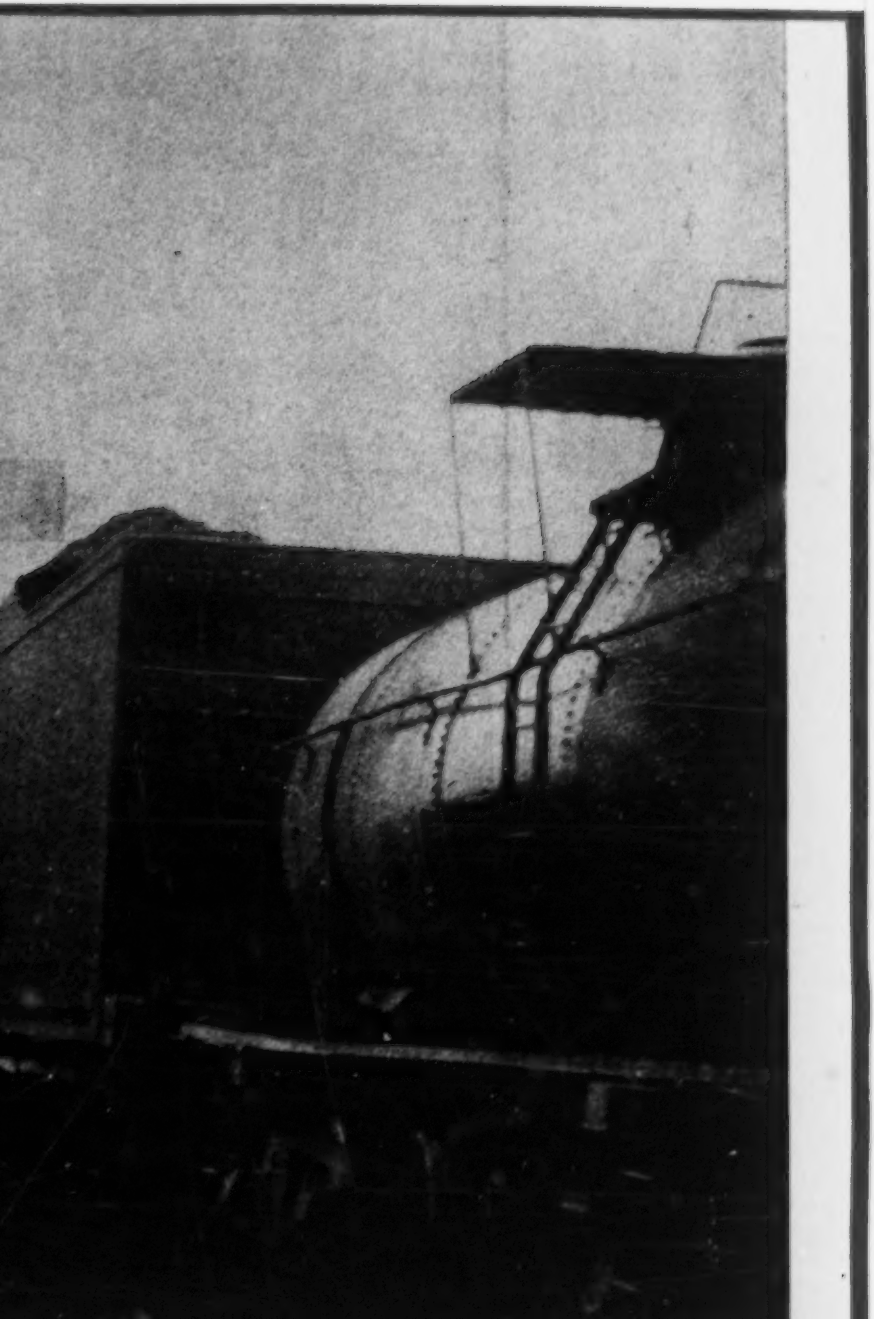


EXHIBIT "E"

By Mr. Black:

Q. Mr. Bruner, I believe you stated that when the engines stopped at the coal chute that you were in the cab of 1182?

A. Yes sir.

Q. You had reached the cab before the engine stopped?

A. Yes, I got into the cab while it was going back, to check the fire and water, and then to shut off the blower; when I seen the fire was catching up I shut the blower off on 1182.

Q. When you got down out of the cab of 1182, on to the ground, you may state whether or not you had your lantern with you?

A. Yes sir, I did.

Q. Just what were your movements from then on?

A. I went to the rear end of the tank on 1182, and I was going to go across to the ladder on the back end of that tank. I was in the act of going over that draw-bar there when the engines, without any warning of any kind, [fol. 41] started up. There was no whistle or bell or warning of any kind. They started up. I lost my footing and was thrown off balance, and fell down behind the tank of 1182. I don't know all the commotions that went on, it was too quick to know all what was happening, but the next thing I knew, I finally got in the clear, after my foot had been run over by apparently one of the wheels or maybe two, of the tank of 1182. But I jerked myself on out into the clear while the engines were still in motion. Of course, I was on the ground at that time. I grabbed for my foot, naturally it was painful as the dickens. I grabbed for my foot, that is when I realized I had been completely run over. I grabbed for my foot, it was bent off in the other direction, toward the front. I could not attract any attention, I hollered for help, I could not get any attention. I dropped my lantern, in the meantime. I could not see it, but I did happen to have a flashlight in my pocket, so I got my flashlight and signaled around with it, trying to, and hollered, but nobody came, so I drug myself forward up the track on the north side of the tracks, drug myself forward a ways. In the meantime the engines were stopped. When I noticed they were stopped far enough ahead so I figured it was safe I drug myself across the tracks and flashed my light around,

and finally Mr. Colosimo came up to me and asked me what was the matter. I told him I had been run over, then he got help from another hostler, the inside hostler was at the cinder pit. He came up and got Mr. Haynie, who was acting as inside hostler, he helped and took me to a car and to the hospital.

Q. He was the inside hostler?

A. Yes.

Q. Did you ever lose consciousness?

A. I thought I remembered all, unless it was in the fall. If it was, it was only for a few seconds. I can't remember. After I was run over, after I cleared the track I never did lose consciousness. I was conscious of it all. I would have been very glad if I could have lost consciousness then, from the pain I was in.

I said I would have been glad if I could have lost consciousness from the pain I was in, after I was run over, but I did not. I had to take it. It was the most miserable thing I ever hope to experience.

Q. Did you give Colosimo any sign or signal w-atsoever?

A. No sir; I intended to give the signal. I did not give him any signal to move, no sir.

Q. Was there any bell rung?

A. No sir.

Q. Any whistle blown?

A. No sir.

Q. What was the first indication that you had that the engines were going to be moved?

[fol. 42] A. When they gave a jerk. With the engines, those draw-bars, when they start out, there is always slack in the draw-bars. They start with a jerk. That is the first I knew they were going to be moved, when they started out.

Q. Just describe that slack that you say usually exists in the coupling apparatus of the engines?

A. In the rear end of the locomotives and the cars, for that matter, but the locomotives they have large springs in there to help take up some of the impact of the jars, and so on. When there is pressure against the draw-bar, they will give so there is a few inches of slack. Where there is slack enough on when they start they will take up what slack there is, and naturally they will jar.

Q. So the second engine will start with a jerk?

A. Yes, it will give a little jerk when they start. They will jerk.

Q. You say you were climbing up the back of 1182?

A. Yes.

Q. That was the second engine?

A. Yes, I was getting ready to go over the draw-bar, so I could go up the ladder of 1182, when they started; that is, I was starting over this draw-bar when they started up. I never did get clear across.

Q. Mr. Bruner, you were taken to the hospital, were you not, soon after this accident?

A. Yes sir, they took me there. They were going to call—— (Answer not finished)

Q. You may state whether or not, after you were taken to the hospital you had a conversation with Mr. Colosimo? Answer "yes" or "no".

A. I did not get that.

Q. While you were at the hospital did you have a conversation with Colosimo?

A. Yes.

Q. Can you tell the court and jury when that was, with reference to the accident?

A. They came in to see me.

Q. Tell us about when it was, first.

A. It was a short time after the accident. I don't remember how many days. They would not let any visitors in there. It was a few days after the accident—whenever they would let visitors in. He said he had tried to get in before. I don't remember how many days after the accident, or how long, but when they would let him in he came in to see me, and he said——

[fol. 43] Q. So it was sometime after the accident?

A. Yes.

Q. A few days after the accident?

A. Yes.

Q. Who was present at that time?

A. Myself and my wife.

Q. Colosimo?

A. Mr. Colosimo, yes.

Q. Anybody else?

A. Not that I remember of.

Q. Do you recall that conversation at this time?

A. Yes.

By Mr. Rawlings:

Q. Will you please explain to the jury what you mean by "spotting the engine for sand"?

A. That is when you get the sand spout even with the sand spout on the engine, or in that particular move, or whatever place you want to put it, if you want it spotted at a certain place you spot it at that place. That is what they call "spotting the engine for sand or water". If it is water you get it even with the tank. They call that spotting the engine at any certain place that you have to have it spotted to do your work.

Q. You placed yourself in a position where the hostler could see your lantern and signals, so you could properly signal for the spotting of that engine?

A. Yes, that is correct.

Q. When you spotted for coal where was it necessary for you to be for the hostler to see you?

A. I would have to be on top of the tank so I could tell when it got even with the apron; I would have to be on top of the tank to make the proper spot.

Q. Was there a ladder provided on the tank for the purpose of you climbing up and to be in position to spot the car?

A. On the rear end of the tank, it is there to climb to the top of the tank.

Q. Will you point that ladder out to us?

The Court: I believe that was indicated on direct examination by Mr. Black.

Q. There appears at the rear of 1182 a ladder—is that the ladder that is used for that purpose of climbing up there so you can spot for coal?

A. Yes sir.

[fol. 44] By Mr. Black:

Q. Mr. Bruner, what did you intend to do when you got down from the cab of Engine 1182?

Mr. Bruner, during the time you worked in the yards as hostler and hostler's helper, what, in the ordinary course of your employment there, would you do or be expected to do and instructed to do, under those circumstances?

A. I was supposed——

Q. Mr. Bruner, what was the custom and practice?

A. The custom and practice for the hostler, do you mean?

Q. Yes.

A. Whenever you have a movement to make the hostler would make the movement, we would make it in the usual way, the practice that we do operate, the way we generally do; it is an everyday occurrence.

Q. What was the custom and practice where you were coaling two engines, both headed toward the east, where the coal was placed in the west engine first?

A. Outside of where you make the stop where he did, the hostler's helper would be up there to take the coal, but when he had instructed me not to be there, naturally I was up on the engine that he had told me to take coal on. Otherwise, if the helper is to take coal he would be back on that engine to take the coal.

Q. Did you have any instructions with reference to the engine you were to take coal on?

A. He told me I was to take coal on Engine 1182, and he would take coal on Engine 1149, and he instructed me to take coal on 1182.

Q. In the ordinary course of your employment, how would you perform your duties, how would you do that?

By Mr. Black:

Mr. Bruner, had you ever coaled engines at this coal chute before?

A. Yes.

Q. Had you ever coaled two engines connected together, facing toward the east, before?

A. Yes.

Q. Were you acquainted with the custom and practice of the operation at that time?

A. Yes.

Q. And, in accordance with the custom and practice, and your usual custom, what would be your duties and how would you perform them in accordance with that custom and practice?

[fol. 45] A. I would place myself on the engine tank that was to be coaled. In order to give a signal to the hostler so he could make the proper stop, I would have to be on top of the tank, and get myself in a position where he could see me, to get the signals to operate on.

Q. From what position would you give the signal?

A. On top of the tank.

Q. What signal would you give?

A. A back-up signal, around, like this, a back-up signal. Whenever you get the coal apron in line with where the coal had to be dropped in the engine, I would give the stop signal. I would have to be on top of the engine in order to see where to spot the apron, and also to give the signals where to stop.

[fol. 46] Cross-examination.

By Mr. Jensen:

Q. Now, Mr. Bruner, I understond you to say that you had seen Colosimo in and about Grand Junction during the period that you worked there, prior to the time you worked on this night?

A. Just in the jobs, seeing him coming and going.

Q. Did you speak to him?

A. Once in a while spoke.

Q. You saw him around?

A. Yes.

Q. Like you had a lot of the other men?

A. That is all.

Q. I think you said that on this particular day the engine caller had told you about this job being open, and you could take it if you wanted it?

A. The engine dispatcher.

Q. The engine dispatcher?

A. Yes.

Q. So you were assigned to work with Colosimo?

A. Yes.

Q. You went on shift at what time?

A. Eleven P. M.

Q. You did outside work all that time?

A. The job was what they call a swing job, but they paid the outside pay, because they had to go to the main line if they are needed. They were classed as outside hostlers.

Q You picked up these two locomotives at the cinter pit —that is, one of them was at the cinder pit, and the other one you brought down from the roundhouse?

A. The inside hostler brought it down and hooked it on 1149. He brought 1182 down.

Q. These two locomotives were coupled together; is that right?

A. Yes.

Q. 1149 at the rear and 1182 in front?

A. Yes.

Q. You got on 1182; is that right?

A. That is right.

Q. And you got on the front end?

A. I was in the cab when Mr. Colosimo came up and gave me instructions—I was in the cab.

[fol. 47] Q. Do you remember whether you got over the pilot?

A. I don't remember whether I got over, only I got into the engine, I remember I was in the cab when Mr. Colosimo came up. In getting on the engine, to begin with, I may have gone over the engine to check the sand. Sometimes I do that.

Q. This is the sand dome. Is that the first dome?

A. With most engines it is the front dome.

Q. The dome sets up about like that?

A. A little larger.

Q. Then you have another dome back here?

A. Yes.

Q. Which is the steam dome?

A. Yes.

Q. Of course, this is the stack?

A. Yes.

Q. Then you have your pilot about like that?

A. Yes.

Q. Now, on 1182, as you remember isn't it a combination pilot and switch engine combined?

A. Yes.

Q. So that the pilot or bar is across, and on either side there are steps that you can step on, then there are some steps that go up here?

A. Yes, up to the running board.

Q. Then there is a running board that runs back like that; is that right?

A. Yes.

Q. That is the running board you were talking about when Mr. Black was asking you questions?

A. Yes.

Q. Now, up here you have a hand-rail, haven't you?

A. Yes.

Q. And that hand-rail goes down so that when you step up here a couple of steps, you could walk up here and hold

on the rail, and walk on the running board; is that right?

A. Yes.

[fol. 48] Q. Now, about at this point you have a window, haven't you?

A. Yes, and a little door.

Q. And the engineer sits about here?

A. Yes.

Q. Of course, this window sticks out; it looks out toward the front of the locomotive?

A. Yes.

Q. You can walk from that running board through that window, and get into the cab; is that right?

A. Yes.

Q. By the way, has 1182 got a stoker on it, or is it hand fired?

A. Some of those engines are hand fired, some are not. I believe that is one of the stoker engines.

Q. You don't need to take my word, but they do hand fire?

A. Some of the engines are stokers and some are not. I don't remember which ones were hand fired, and which were stoker.

Q. In the cab you had curtains on that cab, didn't you?

A. Yes.

Q. Of course, your tender or your tank, whatever you call it—there is a space between the tank and the cab?

A. Yes.

Q. And of course, this goes up into a gangway, then there is the deck of your cab in there; is that correct?

A. Yes.

Q. Then you have some gates in this tender, about up this high, so that when you fill it with coal the coal will not run down onto the deck of the cab; is that right?

A. Yes.

Q. Of course, you have some curtains here that hang down over this point, around the side, so when you are running coal and water this curtain hangs over the gangway, so the cold air won't get in?

A. You have curtains on the side, too.

Q. Short curtains down from the cab to the top of the tank?

A. Yes.

Q. That only comes down about this far?

A. They are pretty long.

[fol. 49] Q. There is a ring around there?

A. They slide back. There is board across it. They drop it down into the coal tank. It comes clear into the tank, that curtain, with a board across it.

Q. Mr. Bruner, of course this entire tank holds two things —coal and water?

A. Yes.

Q. The coal comes up only to about this point?

A. Yes.

Q. So then you have got it about like that?

A. Yes, that is near enough.

Q. That holds coal?

A. Yes.

Q. And the rest of it is all water?

A. Yes.

Q. Now, if we were looking down on the top of this tank, this tender, rather, if we were up above it, and could look down into the top of it, it would look something like this, wouldn't it?

A. Well, except for your coal that goes clear across.

Q. Isn't there a water jacket on either side?

A. That is at the top.

Q. So lower down there is a jacket, but the one compartment is about like that?

A. It goes straight across.

Q. This tank part?

A. Yes.

Q. You have a hole here where you take water?

A. Yes.

Q. This is the coal place?

A. Yes.

Q. Now, on that particular 1182 there is a little kind of a house up there that the head brakeman rides in?

A. Some engines have it on; some do not.

Q. 1182 is a road engine?

[fol. 50] A. A road engine.

Q. 1149 was strictly a switch engine?

A. Yes.

Q. When you took the sand, you had to get up on top?

A. I was inside of the cab before we moved back. I went from the cab out.

Q. I understand you were inside the cab when you and Mr. Colosimo had the discussion what you were to do?

A. Yes, we waited for them to complete the cleaning work.

Q. He told you they did not have to take 1149 for sand?

A. Yes.

Q. He said they had to take sand on 1182, so you were to stay with 1182; and that he would coal 1149 and you would coal 1182?

A. Yes.

Q. Ordinarily—I think you said this before—it would be your business to go back and coal both locomotives if he had wanted you to do it?

A. If he had told me to, I would.

Q. It was your business?

A. Yes.

Q. That was a part of your duties?

A. My duty was to do whatever he told me to.

Q. If he had told you to go back on 1149, the locomotive he was on, and coal that locomotive, you would have to go back and do it?

A. Yes.

Q. But he told you to stay on 1182 and he would take the coal on 1149; is that right?

A. He told me he would take coal on 1149, and for me to coal 1182.

Q. Yes. All right, now you say you were in the cab when that took place?

A. Yes.

Q. Did you go there when he came along?

A. I was when he came up; I was in the cab of 1182, and he came by and told me that.

Q. How far is it from this board walk here on this runway, or whatever you call it, up to the top of the cab?

[fol. 51] A. They are different heights, I don't recall just how high that would be.

Q. It would not be over four feet?

A. About five feet, I imagine, or six. They are at different heights.

Q. We are speaking of 1100 engines.

A. That is what it was. It would be probably five feet, or a little more.

Q. How far would it be from the top of the tender to the top of the cab?

A. Probably a step down there, two and a half, or three, possibly.

Q. Do you remember how much coal you had in the tender?

A. As a rule there is about—I can't tell exactly how much there is there, but they had to be coaled. I don't recall how much was in there.

Q. You don't recall how much there was in there?

A. Because he told me it had to be coaled. When you take coal on you take whatever is needed, regardless of what is the amount. You take whatever amount is needed.

Q. Did you have occasion to observe the coal in these tenders, to determine how much there was in them?

A. Not right then?

Q. Did you at any time, or do you know?

A. No; because you generally do that, when you take the coal on, when you judge the amount they take and tell the hostler the amount they take, because he has to keep a record of it.

Q. Did you have occasion to close those doors?

A. They have to be closed before you take the coal. They were closed. I observed they were closed.

Q. You observed they were closed?

A. Yes.

Q. Of course, they had to be closed at the cab side?

A. Yes.

Q. You can close them from the other side, but not lock them?

A. That is right.

Q. They were locked from the cab side?

A. Yes.

[fol. 52] Q. He talked to you about how you would do it, that you would go to the sand house and you would sand this 1182, and then you would move down to the coal yard, and he would coal 1149, and then they would spot 1182, and you would coal 1182?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Where were you going to take those locomotives?

A. We had to go there, to that one switching, to go to the yards. Those engines go to the yards——

Q. Yes.

A. (Continued.) And the 1182 would have to be set over on another track, up at the water track.

Q. It was to go where?

A. On the south yard.

Q. It was going to Glenwood?

A. To Delta. Once in a while they change those runs. He said that was a road engine, anyhow it was going out, I could not be definite on that. They have used them both ways.

Q. Where were you when you rode down from the sand house to the cinder pit?

A. I was on the running-board, yet, of the engine. I got down.

Q. From the cinder pit to the sand house?

A. I got out on the running-board.

Q. As you rode down there you rode on this running-board; is that correct?

A. Yes.

Q. All right. Did you give him a signal to stop at the sand house?

A. Yes sir.

Q. When you got down to the sand house you had to get up on top of the boiler, didn't you?

A. Yes.

Q. And you have to lift the top of this sand dome here?

A. Yes.

Q. It hangs there by a chain, so they will not fall off?

A. Yes.

[fol. 53] Q. Then you pull the spout down from the sand house, and when it gets full you lift the spout out?

A. Yes.

Q. Then you had to put the top on that sand dome?

A. That is right.

Q. By the way, do you remember when you started this movement what time of the day it was?

A. I did not notice the exact time, no.

Q. Have you any idea of the time it took you up to the time you got hurt; was it a half hour, do you think?

A. Doing that work?

Q. From the time you left the cinder pit till you got hurt?

A. It only takes I suppose not over five minutes to take sand, I would say—No, it would not be half an hour.

Q. Well, you only had to move fifteen feet from the cinder pit to the sand house?

A. Yes.

Q. Then you had to drift on down to the coal chute? About how long did it take you to take coal, have you any idea?

A. No.

Q. Do you remember how long it took you to take coal on that occasion, on 1149?

A. It seemed it did not take long.

Q. Did it take a minute or two—you were there?

A. I was, yes, I was not timing it, of course, I was doing my work.

Q. What is your best judgment?

A. It generally takes a little longer than that, I guess.

Q. All right. Of course, you had to let him know when you got through sanding this locomotive, didn't you?

A. Yes.

Q. So you gave him a signal to back up?

A. Sure.

Q. Where were you when you gave him that signal?

A. I was still on the running-board. I got down.

Q. You got down on the running-board?

A. Yes.

[fol. 54] Q. Then, when they started back up, what did you do?

A. I went into the cab, then, by the time I got down there, I was getting in the cab, I was on the outside, and then when we started I went inside through the cab then and checked my fire and steam.

Q. It really was not any of your business to check the fire, was it?

A. Yes, because there are lots of time- they will go out. The engine will be ready to go out and it will have a dead fire.

Q. Before you made this movement, Colosimo had got up in the cab?

A. He came to the gangway, he did not get clear into the engine.

Q. You checked the fire. All you did was to open the doors and look in at the fire; is that right?

A. Yes.

Q. That door is opened automatically, isn't it? You step on a lever and the door opens?

A. They are some of them, but some of them are opened by hand. If the air is on——

Q. You don't recall whether the air was on, or whether you opened it by air or by hand?

A. I believe I opened it by hand.

A. Is that door one of the doors that splits, and part goes up and part down? It goes on hinges?

A. Some of them will open like a butterfly door. Some of them will open out from the middle and go both ways, and some sideways.

Q. But they do not swing out on hinges?

A. No.

Q. They part somewhere in the middle and go up or down, either way?

A. That is right.

Q. You opened the door and looked in the fire; is that correct?

A. Yes.

Q. You saw the fire was going all right?

A. Yes.

Q. Did you turn off the blower?

A. Yes.

Q. Now, the blower is merely a fan that blows air through the firebox, and creates a draft, is that right?

[fol. 55] A. No, it is steam that comes out of the pipe up in the smoke stack that creates that draft.

Q. In other words, it blows the air out of the stack, and a part goes through there?

A. There is a part of it goes around at the bottom of the smokestack, and the steam is going through there.

Q. You turn that off by closing the valves in the cab?

A. Yes; you turn it to the left and close it.

Q. Left-handed threads?

A. It turns to the right; I guess you are right. You turn it to the right to close it, I was mistaken.

Q. You turn it to the left to open it?

A. Yes.

Q. What else did you do?

A. I saw that there was plenty of water.

Q. There is a glass?

A. Yes, you look in the glass to see if there is water in the boiler.

Q. All you had to do to see if there was water in the boiler was to take a look at it?

A. Yes; and there is a valve.

Q. Did you open the valve?

A. I don't believe I did. As a rule, if you can see the water you don't have to do it.

Q. The water is absolutely stationary; so you open the valve and blow the water up, or you close the valve and the water will come back in the glass so you can see it, is that right?

A. Yes.

Q. How long do you think it took you to do all that?

A. It would not take very long to do that.

Q. About thirty seconds at the outside, isn't that right?

A. It would probably be a little longer than that, I would not know exactly, without timing it. I don't know how long it would take.

Q. You say there are two aprons at the coal chute?

A. Yes.

Q. But those aprons are not sufficiently far apart so you can coal two locomotives at once?

[fol. 56] A. No.

Q. In other words, you get one locomotive in there, and there is no room for another?

A. That is right, there is no room.

Q. You coaled this locomotive at the first apron?

A. I did not get it coaled.

Q. I mean 1149 was coaled at the first apron?

A. So far as I know. I don't know which apron it stopped at. I don't know where he stopped.

Q. Mr. Bruner, I hand you what has been marked as defendants' Exhibit "1", that is supposed to be a sort of a half front view of 1182. It was taken at Grand Junction. Does that look like 1182 to you?

A. Yes.

Q. The portion shown?

A. Yes.

Q. You can see, from your present memory, that is a fair likeness of the front end of that locomotive; is that correct?

A. Yes.

Mr. Jensen: Any objection?

Mr. Rawlings: No objection.

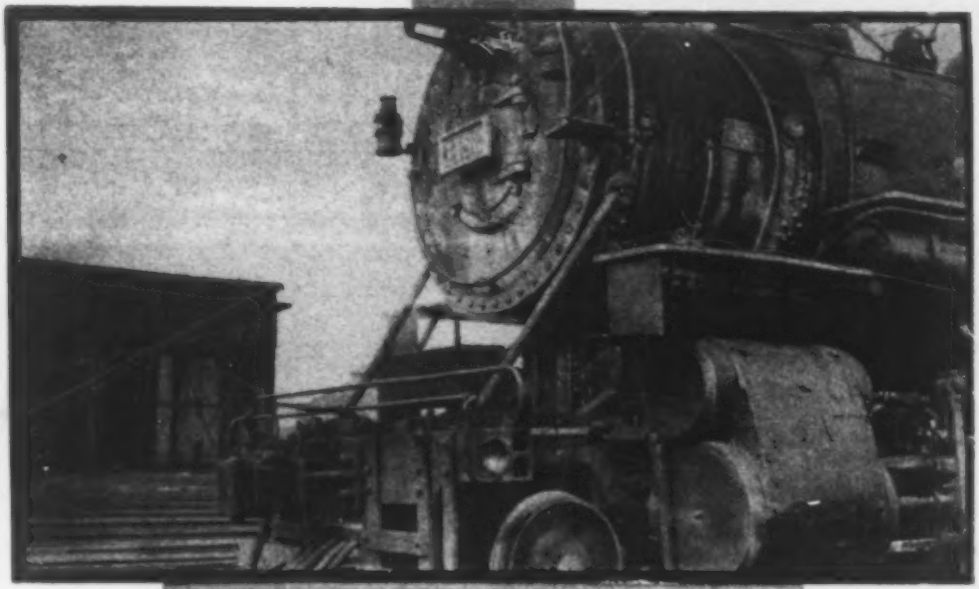
Mr. Jensen: I will offer it in evidence.

Mr. Rawlings: No objection.

The Court: It way be received.

(Here follows 1 photolithograph, Exhibit "1")

Exhibit "1"



Showing the front end and left side of Engine 1182

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By Mr. Jensen:

Q. Mr. Bruner, the pilot on this locomotive is right underneath that coupler?

A. Yes.

Q. And the steps we were talking about, leading to the running-board, are shown just over the cylinders; is that correct?

A. Yes.

Q. Then a portion of the running-board is right on top of the cylinders?

A. Yes.

Q. Then there is another step, and the other running-board runs back toward the cab a little higher than this one running-board; is that correct?

A. Yes.

[fol. 57] Q. And this rail that you see right near the front end of the boiler, that is a hand-hold, as you go up these steps that is a hand-hold to hold on to; is that correct?

A. That is it going over. You can't reach that from here.

Q. There is a hand-hold all around the cab?

A. You can't reach that very handy to go up these steps. It is a short distance over. There is the rail (indicating).

Q. At the top of the picture you do see the rail which I have shown here, near the top of the locomotive?

A. They don't run down like you have it. It stops at the top there.

Q. It stops right here, does it?

A. Yes.

Q. Now, Mr. Bruner, I hand you what was been marked as Exhibit "2"; that shows the coal chute at Grand Junction, doesn't it?

A. Yes sir.

Q. And it is looking west?

A. Yes sir.

Q. And the camera is placed up between the coal chute and the sand house, isn't that correct?

A. The coal chute is?

Q. The camera that took the picture?

A. Oh, the camera, yes.

Q. It is between the sand house and the coal chute?

A. Yes.

Q. It shows the north side of the coal chute?
A. Yes. Where the aprons are is the north side.
Q. Do you recognize that man there in the picture? That is Colosimo, isn't it?
A. It is pretty small to see, it looks like him.
Q. That is Colosimo, I will tell you that.
A. (No answer.)
Q. These two objects sticking out from the side of the coal chute are the aprons you told us about, aren't they?
A. Yes sir.

Mr. Jensen: I wonder if you would re-mark this, and put this number up here, because we might have to tear that off.

[fol. 58] (Exhibit re-marked, as indicated.)

Mr. Jensen: Do you gentlemen have any objection to this photograph, now?
Mr. Rawlings: Let me see it again.
Mr. Black: It is looking toward the west?
Mr. Jensen: That is right. I offer Exhibit "2", if your Honor please.
Mr. Rawlings: No objection.
The Court: It may be received.

(Here follows 1 photolithograph, Exhibit "2")

By Mr. Jensen:

Q. Do you remember how far this coal chute extends along the track, or do you have any judgment about it, at all?

A. You mean the width of the coal chute?

Q. I mean from this point to that point?

A. I don't imagine it is over thirty-five or forty feet.

Q. About thirty-five or forty feet?

A. That would be my guess. I could be wrong.

Q. So that when these two locomotives were stopped, a part of 1149 was east of the coal chute, and the entire portion of 1182 was east of the coal chute; isn't that correct?

A. Yes.

Q. You don't know whether the stop was made at the first or second apron?

A. I never looked to be definite about that part of it. I believe that is where he stopped, though.

Q. Those aprons—as I understand it, you pull them down?

A. Yes.

Q. They are big steel slides; is that correct?

A. They are steel, they are about two and a half feet wide, eight inches high, or some such a matter.

Q. Something like the coalmen used to use in Salt Lake when they used to unload coal over the sidewalk; they had a long steel chute?

A. Yes, only these are not so long.

Q. You pull this apron down so it is inclined towards the tank?

A. Yes.

[fol. 59] Q. Then you pull another chain which lets the coal into the apron?

A. Yes.

Q. It slides down until you have enough coal and then you pull the chain?

A. You let go of the chain.

Q. Then the apron comes up?

A. Yes. Sometimes you have to lift it.

Q. But it is counterweighted so it goes up out of the way; is that right?

A. Yes.

Q. Does that coal make much noise going down?

A. Not the slack does not.

Q. The slack does not?

A. No.

Q. Lump coal does?

A. If there isn't slack in it. Ordinarily there is no need of a great amount of noise.

Q. Do you remember hearing Colosimo take coal on this night in question?

A. I don't remember any noise about it, no sir. You can take coal without making any noise. I don't remember of him making any undue noise.

Q. You don't know?

A. Because he could have done it while I was in the cab, or somewhere; I don't remember any great out-of-the-way noise.

Q. When you take that coal do you stand on the coal pile or on the top of the tank?

A. As a rule you are right on the coal. It would be a part of the back of the tank. You would stand on a part of the coal there toward the back of the tank.

Q. So you stand on the part of the coal toward the back of the tank?

A. Yes.

Q. As the coal comes in off the apron, it spreads over the tank, is that right?

A. Yes.

Q. That is within the coal compartment?

A. Sure.

Q. Now, you did not give Colosimo any stop signal when he spotted that locomotive at the coal chute, did you?

[fol. 60] A. No.

Q. Where were you when the locomotive stopped?

A. I was just getting into the cab of the 1182.

Q. Just getting into the cab of 1182?

A. Yes, just getting in.

Q. Was it your duty to check the water?

A. Yes; we have to see the locomotives have water so they will not blow up. If they get low on water the hostler is responsible.

Q. Was it your duty to shut this blower off?

A. When there is nobody else around we always have to take care of them, with that part of it. That is the practice, if we happen to be there and it is handy.

Q. You got down on the left-hand side, is that right?

A. Yes.

Q. And went around to the rear end of 1182?

A. Yes sir.

Q. Now, in order to get up on the tank you had to cross the drawbar?

A. Naturally.

Q. I think Mr. Black asked you about this Exhibit "A"; I think you are a little mixed up, or else I misunderstood you. There are two rods—there appear to be two rods going across just above the drawbar?

A. Yes.

Q. One of those is the rod by which you pull the pin in the coupler; is that right?

A. Yes.

Q. Then the rod above that is the grab-iron?

A. Yes.

Q. I think you said this morning, although I am not positive about it, that both of these were grab-irons?

A. That is the one he was referring to (indicating).

Q. Oh, I see, excuse me; but that bottom rod you see above the coupler on either side of the coupler, what do you call that?

A. The pin lifter.

Q. It drops down so they can grab that, to lift the pin in the coupler?

[fol. 61] A. Yes, there is a handle on the outside, out in here there is a handle, you see, to pull the pin on this coupler, to couple or leave the engines uncoupled.

Q. The rod going across the back part of the locomotive is the handhold or grab-iron?

A. Yes.

Q. That appears to come down the side of the tank, across the tank and up the other side?

A. This grab-iron going down the corner of the tank is separate from this. Then this grab-iron is hooked to the tank and this one is hooked to the crossbar.

Mr. Rawlings: I don't think the jury saw that.

By Mr. Jensen:

Q. In any event, there is a grab-iron that goes all the way across the tank?

A. Yes.

Q. The grab-iron that goes down either side of the tank at the corner?

A. Yes.

Q. Whether there is one grab-iron or three—well, at least, there are three grab-irons there?

A. Yes.

Q. Now, I show you what has been marked Exhibit "3", you will notice the figure at the left, you can see "1182"?

A. Yes.

Q. Now, as a matter of fact, Mr. Bruner, the locomotive, the front end of which is shown here, is actually a picture of 1149, does that look to you like a fair representation of 1182 and the front end of 1149, coupled together?

A. Yes.

Q. Would you say that was about the condition as it existed on the night of the accident?

A. Yes.

Q. This picture was taken from the side that you attempted to get up on that tank from; is that correct?

A. That is right.

Q. This was taken from the north side?

A. Yes.

Q. Or, at least, it would have been the north side on that particular track?

A. Yes.

[fol. 62] Q. Faced in that direction?

A. Yes, facing east.

Mr. Rawlings: Are you offering this now?

Mr. Jensen: Yes.

Mr. Black: No objection.

The Court: It may be admitted.

(Here follows 1 photolithograph, Exhibit "3")

EXHIBIT "3"

By Mr. Jensen:

Q. Of course, that shows the footboards on the rear end of 1182 and the front end of 1149?

A. Yes.

Q. And it shows the two locomotives coupled together?

A. Yes.

Q. It also shows this grab-iron we were talking about a few minutes ago?

A. Yes.

Q. Both grab-irons?

A. Yes sir.

Q. Mr. Bruner, I think yesterday you said that when these two locomotives came to a stop, down there at the coal chute, that you gave no signal for that stop?

A. That is right.

Q. The reason you gave no signal was that you knew Colosimo was going to take coal on the 1149, and he could stop his own locomotive; is that correct?

A. Yes sir.

Q. But you did give him a signal before you left the sand house, because you wanted to indicate to him that you had completed taking the sand on 1182?

A. Yes sir.

Q. And when you left the cinder pit you gave him a signal and then he whistled off—is that right—to show he was going to back up?

A. He gave the signal, I believe the customary thing to do is to answer the whistle.

Q. In fact, when he backed up from the cinder pit he did give three blasts of the whistle?

A. That is the customary thing to do.

Q. Did he do it on that occasion?

[fol. 63] A. It is the customary thing to do. I believe he must have as long as it is the customary thing to do I believe he must have.

Q. Around that cinder pit you have fire knockers?

A. Yes.

Q. Are the fire builders there, too?

A. The fire builders are in the house; but when they clean the fire they generally leave enough coals in there so it will start, and catch up in due time.

Q. But there are men working around the cinder pits who knock the fires, clean them, and so on?

A. Yes sir.

Q. Shake the clinders out?

A. Yes.

Q. Knock them out of those long bars?

A. Yes; it is necessary to get the clinkers out.

Q. Was there anybody around the sand house other than you two fellows?

A. There may have been somebody working in the sand house, I did not pay any attention to that.

Q. There were no other locomotives there or anybody working around the track, that you saw?

A. There are engines coming and going all the time on the south side of the coal chute, they operate that, and the track to the north.

Q. Did you see anybody else around the sand house, other than you two, when you were there?

A. I never took any particular notice of anybody around the sand house; but they could have been inside.

Q. But you did not see anyone?

A. No, not that I remember of.

Q. There were not any other locomotives being coaled at the coal chute, were there?

A. Not when we backed up there, no.

Q. In fact, up until you were taken out, or till the time that you lost interest in everything, you did not see any other locomotives around?

A. There were engines coming from the roundhouse after we backed up from the cinder pit. Naturally they would put other engines on there.

[fol. 64] Q. I did not ask you what they naturally do. Did you see any other locomotives around the coal chute while you were there?

A. They could be on the opposite side of the coal chute, and I could not see them.

Q. I did not ask you that. I asked you if you saw them?

A. No, I did not observe any, in particular.

Q. Do you remember which glass it was that you examined to see what the water level was in the boiler? Was it the glass on the fireman's side or the engineer's?

A. It was on the fireman's side.

Q. You got down from the running-board, through the engineer's side of the cab?

A. Yes.

Q. You got down on the deck of the locomotive and looked in the blower, turned off the blower, and examined the glass?

A. I checked the water, and the fire first, then I let the blower run a little bit, to finish catching up a little better, I let it run a little to be sure it was caught.

Q. Then you got down on the fireman's side of the cab?

A. Yes sir.

Q. And walked down on the north side, the left-hand side of the locomotive?

A. Yes sir.

Q. To the rear of 1182?

A. Yes sir.

Q. The fireman sits on the left-hand side of the cab, does he not?

A. Yes sir.

Q. And, of course, the engineer sits on the right-hand side?

A. Yes sir.

Q. That is true of all locomotives?

A. Yes sir.

Q. And of course when I say the left-hand and right-hand side I mean looking toward the front end of the locomotive?

A. Yes sir.

Q. Then you walked to the rear of 1182?

A. Yes sir.

[fol. 65] Q. And did you step up on the footboard, or did you step between?

A. Right onto the footboard.

Q. Right onto the footboard?

A. Yes.

Q. You were in the act of climbing over the drawbar when the two locomotives were moved?

A. Yes sir.

Q. You do not have any particular memory as to how you fell, do you?

A. No, I am rather confused.

Q. It happened rather suddenly?

A. That is right.

Q. Of course, you were not taking time to think of all the motions you were going through; is that correct?

A. That is correct.

Q. You say there was not any sudden jerk of the engine?

A. There is always a jerk when we start out.

Q. There was not anything unusual about the jerk; it was about the same sort of a jerk that would be made on the movement of any locomotive under those circumstances?

A. Under those circumstances there would be a sudden jerk, regardless. It would be a sudden jerk.

Q. I understand, because there is a certain amount of play between the extension of couplers?

A. Yes.

Q. When you start pulling away you have to take up this slack and then the locomotive gives a jerk before it starts moving?

A. Yes.

Q. That takes place every time there is a movement; isn't that so?

A. Yes.

Q. By the way, did you have your lantern with you?

A. Yes.

Q. Do you remember whether or not it was lit?

A. Yes, I am quite sure it was.

Q. It was?

A. Yes.

[fol. 66] Q. Are you sure about that?

A. I feel quite sure that it was, because I always carried it lit.

Q. Do you remember making a statement about this lantern, Mr. Bruner?

A. I remember something about it. When they came up there to the hospital one time I believe that I told them I did not remember for sure on account of——

Q. I did not ask you that. I asked you if you remember making a statement about it?

A. Yes.

Q. You did not sign the statement?

A. One statement I did.

Q. One statement; but do you remember Mr. Divisek going up and talking to you sometime in December, 1941, do you remember him coming and talking to you?

Mr. Rawlings: What was that day?
Mr. Jensen: December 31, 1941.

A. I believe that is when I was in Denver, I believe that is when you have reference to.
Q. You went up to see Dr. Curfman?
A. Yes.
Q. He is the chief surgeon of The Denver & Rio Grande?
A. Yes.
Q. While you were there you talked to Mr. Divisek, or he talked to you?
A. Yes; they asked me to come up to the office.
Q. I call your attention to a statement made on December 20, 1941, and particularly to the last sheet of it where there is some handwriting. That is your signature, isn't it, Mr. Bruner?
A. That is my signature.
Q. That is your handwriting?
A. No sir.
Q. Was that written in when you signed that statement?
A. I believe it was, yes, by somebody; but, at the time I could not read the statement myself, I was unable to read at the time.
[fol. 67] Q. You did talk to somebody about this, on December 20, 1941, didn't you?
A. Yes, while I was still in bed.
Q. Mr. Headley—R. B. Headley?
A. Yes.
Q. And a lady by the name of Ada M. Hall?
A. I don't recall the names.
Q. Was that at the hospital?
A. That was at my home.
Q. He talked to you about it, and then a statement was written up on the typewriter; is that correct?
A. They took it in shorthand, then they went and typed it out and came back and wanted me to sign it.
Q. Did they read it to you?
A. They did not, no.
Q. Did somebody read it to you?
A. My wife's sister read, but I was in such pain I could not tell all that was going on.
Q. That was the day after you were married, wasn't it? You were married on the 19th of December, weren't you—1941?

A. That sounds about right—the 21st, I believe.

Q. It sounds about right?

A. The 21st I believe would be correct.

Q. And on December 20th was when these people came down and talked to you about it?

A. That is right; that is according to your dates, if that is correct.

Q. At that time, to these people there, Mr. Headley and Miss Hall, did you say in substance or effect that you had an electric lantern with you at the time of the accident, but you did not know if it was lighted, or not?

A. I may have made some statement to that effect, but I was in such pain there that it is hard to state just exactly what I did say.

Q. Mr. Bruner, just a moment ago when I was talking about the statement, before I found it, didn't you make the statement here in court that you told somebody that you had a lantern with you, but you did not know whether or not it was lighted; didn't you make that statement ten or fifteen minutes ago?

A. Possibly.

[fol. 68] Q. You are not in pain now, are you?

A. It still hurts, yes, but not as severe as it was.

Q. You say now that you did have a lantern with you?

A. Yes sir, I know I had it with me.

Q. You say now that that lantern was lit?

A. I feel quite certain that it was lit.

Q. You feel absolutely positive that it was lit?

A. Yes.

Q. Do you know whether or not your lantern was broken when you fell?

A. I could not find my lantern after I fell, I could not find it.

Q. Mr. Haynie picked it up, didn't he?

A. That is what he said.

Q. And you had borrowed the lantern from Haynie?

A. Yes sir.

Q. It was Haynie's lantern?

A. Yes sir; I had left mine on a locomotive, and I have not recovered it yet.

Q. So you don't know what happened to your lantern, of your own knowledge?

A. I dropped it there some place.

Q. Except that you dropped it?

A. I lost it in the fall.

Q. Do you recall whether or not you were out over the drawbar when you fell?

A. I was in the act of going over.

Q. You were in the act of going over?

A. I was in the act of going over.

Q. Do you remember which side—after you were run over, do you remember which side you crawled out on?

A. I was on the north side.

Q. You crawled out on the north side, is that right?

[fol. 69] A. That is definitely, I was on the north side of the engine when I fell, that is the side that I got in the clear on.

Q. That was still on the fireman's side?

A. Yes sir.

Q. Of course, you immediately made an outcry for help?

A. I grabbed for my leg the first thing. Of course, my leg was bent forward, I was helpless, outside of crawling. I hollered for help, I did not get any response or any assistance. I finally got the flashlight out of my pocket and flashed around and kept hollering for help, but nobody came.

Q. Colosimo finally came?

A. After I had dragged myself up the tracks a ways, across from the tracks, and drug myself across to the other side of the tracks, where I figured I could probably attract attention of the men working around the coal chute, or somebody.

Q. He finally came?

A. Yes.

Q. And he left and got Haynie?

A. Yes.

Q. And the two of them put you in Haynie's car?

A. No, it was the machinist's car at the pit.

Q. And they took you to the hospital?

A. Yes.

Q. Mr. Bruner, yesterday when Mr. Black was questioning you, he was asking you about the custom and practice. Of course, as far as the custom and practice is concerned, Colosimo, being the hostler, and you being his helper, he could have had you coal 1149, couldn't he?

A. Yes.

Q. He could have stayed in the cab and directed that you get up on the tank of 1149 and coal that particular locomotive?

A. Yes.

Q. These two engines do not take as much coal as big road engines?

A. No.

Q. You can usually coal them by one spot, can you?

A. As a rule, yes.

Q. Of course, with the bigger engines, where they have a great big tender, sometimes you have to move the engine two or three times to get the tank full of coal?

A. Yes.

[fol. 70] Q. Of course, where you have a big engine like that, ordinarily you get down there and take the coal while he moves the engine to the various spots that you want it; is that correct?

A. Yes.

Q. You told Mr. Black yesterday, as I recall it, that of course Colosimo was the boss; he was the man that was to direct what was to be done; is that correct?

A. Yes.

Q. You were there to do what he told you; is that correct?

A. That is correct.

Q. Mr. Bruner, when you were in the cab there, of 1182, down at the pit where you were discussing what you were going to do, will you state to us again exactly what was said, as near as you can remember it?

A. Mr. Colosimo came to the cab and told me that both engines needed coal; that I would have to take sand on engine 1182, and he would take coal on engine 1149, and for me to sand engine 1182, and also coal.

Q. That is the way you remember what was told you at that time; is that right?

A. Yes, he said he would take the coal on 1149, and for me to sand 1182, and for me to coal Engine 1182.

Q. Didn't he state to you at that time that you should stay on Engine 1182, and he would take the coal on 1149?

A. He told me he would take the coal on Engine 1149, and for me to coal 1182.

Q. I want you to pay particular attention to my Question: Didn't he state to you at that time for you to stay on 1182, and that he would take coal on 1149?

A. I don't believe he said, in those words, for me to stay on Engine 1182. He told me for me to take coal and sand on 1182.

Q. I want your best recollection about that.

A. That is correct. He just told me the work that had to be done. He did not tell me how to do it.

Q. That is your best recollection of that conversation?

A. Yes.

Mr. Jensen: That is all.

Redirect examination.

By Mr. Black:

Q. Mr. Bruner, you stated on cross examination, that you borrowed the lantern from Mr. Haynie?

A. Yes.

[fol. 71] Q. When did you borrow that lantern from him?

A. Along that night, when I came in contact with him to commence that shift, I believe he said he did not need a lantern; that I could use his that night when I went to work on that particular shift.

Q. Is Mr. Haynie a hostler?

A. He was acting as an inside hostler at that time.

Q. You used the lantern during most of that shift?

A. Yes, I had the lantern for that shift.

Q. For what purpose did you use the lantern?

A. For giving signals for whatever movements had to be made. I gave the signals to the hostler for whatever movements were necessary.

Q. Had you used that lantern at any time after you left the cinder pit on this movement you described to the jury?

A. Yes sir. I had used it to give signals with, to stop at the sand house and also to let him know that I had completed taking the sand, I gave him the signal to back up.

Q. Did you have any other means of communication or signalling to Colosimo, except this lantern?

A. That is what we used the lantern for, was to give the signal, to know that it was ready for the engine to be moved, and that he should not move until he did get that signal.

Q. Why did you look for the lantern after the accident? Did you look for the lantern after the accident?

A. I reached around for it, and I could not find it.

Q. What did you do then, after you looked for the lantern?

A. I could not find it. I hollered for help and could not attract anybody, then I got my flashlight out of my pocket, and flashed that around to attract some attention; and I kept hollering for help, and did not have any success in attracting any attention there. That is when I moved up the tracks, the best I could, a ways, to where I would be in front of the engine far enough to cross to the other side of the track, to see if I could attract attention at the cinder pit or coal chute where there might be anybody around.

Q. Mr. Jensen inquired about a statement that was made on the 20th of December. Do you recall that statement?

A. Yes.

Q. When were you taken from the hospital to your home?

A. I believe the 17th of December.

[fol. 72] Q. What was your condition at the time the statement was made?

A. I was in great pain, due to the fact that right after I had got out of the hospital I had started to go—I will have to show you this. I fell on the stump of my leg; and naturally the motion would be to catch my weight, which I did. I landed right on the end of the stump, with all my weight. I was in very great pain, to say the least. I could hardly do anything; and I had taken over-doses of medicine that I had got from the doctor, to try to ease the pain, or get some sleep. I could not sleep after that. I lost sleep and everything. I could not even read, or anything. I had taken over-doses, trying to get some ease. I had sleepless nights. I could not sleep and I was worn out.

Q. You stated that you could not read, or did not read the statement?

A. That is correct. I did not read it.

Q. You can read, can't you?

A. Yes sir.

Q. Why didn't you read that one?

A. It was too blurred, I could not see the print, or anything. My eyes could not focus on anything to read it.

Q. When was the statement read to you with respect to the time you signed it?

A. It was read that same day. I don't recall what day. It was read that same day in the evening. It was read to me, but so far as being able to pay very close attention to it, all I was interested in was in getting rid of them so I could get some sleep or rest, if I could. I was not in much of a mood to do any concentrating.

Q. Did you later on make a statement to Mr. Divisek, the claim agent of The Denver & Rio Grande? Did you make a statement to Mr. Divisek?

A. He asked me——

Q. I don't care what he asked you. Did you make a statement to Mr. Divisek?

A. No, I did not sign any statement.

Q. Did you talk to Mr. Divisek?

A. I talked to him, yes.

Q. Was something said? If anything, don't say what it was, about the lantern?

A. Yes.

Q. You did make such a statement? Answer "Yes" or "No."

A. Yes.

[fol. 73] Q. What was the date of that statement, as near as you recall?

A. I believe it was right around December 31st, around in that neighborhood, the 30th or 31st.

Q. I believe you explained to Mr. Jensen that whoever operates an engine sits on the right side?

A. Yes.

Q. What side of Engine 1149 was toward the coal chute?

A. The right-hand side of the engine would be next to the coal chute.

Q. The right-hand side?

A. Yes sir.

Q. In order for you to give any signal or communication whatsoever to the operator of an engine, where would you naturally get?

A. I would get up on top of the tank, and in this particular instance in order to be where I should be in order to make the proper spot to take coal, to be in a position for spotting and taking coal both, that is the proper place to be, for that move, up on the back end of the tank of 1182.

Q. Would you—would it be possible for an operator of an engine to see you from the left-hand side of the engine, to which the moving engine was attached?

A. No, you can't see on the left-hand side from the right side.

Q. Mr. Bruner, I show you a photograph marked for identification plaintiff's Exhibit "F". Is that a fair likeness of the rear end of Engine 1182?

A. Yes.

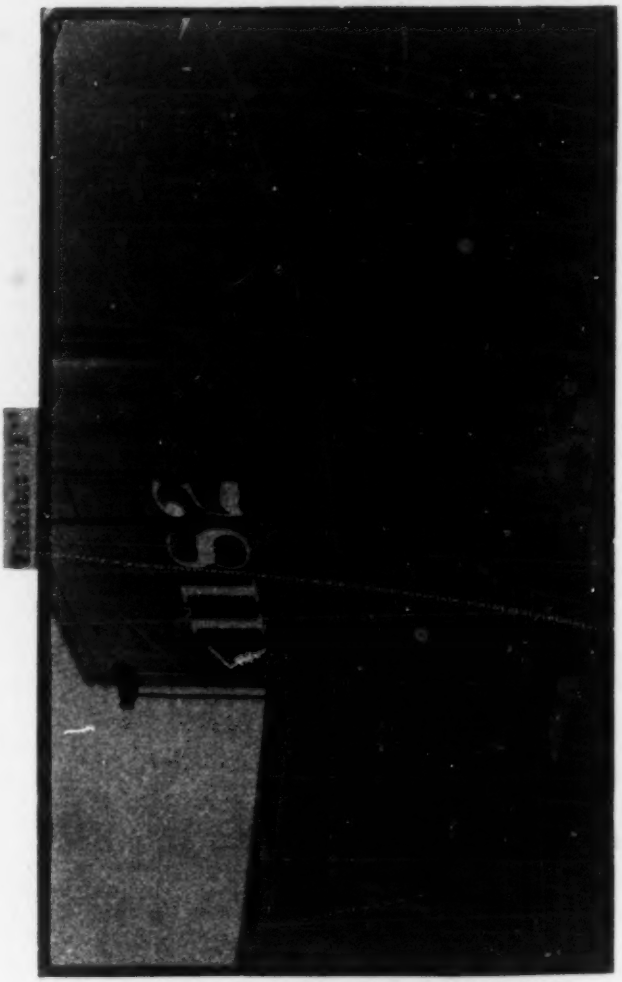
Mr. Black: We offer in evidence, your Honor, this photograph.

Mr. Jensen: No objection.

The Court: It may be received.

EXHIBIT "F"

(Here follows 1 photolithograph, Exhibit "F".)


KIIIS2

By Mr. Black:

Q. Mr. Bruner, will you step over to the jury box there? Mr. Bruner, I call your attention now to Exhibit "A", and I call your attention especially to the iron that angles down from the rear end of the engine to which I am now pointing.

Mr. Black: I am pointing, Mr. Jensen, if you care to step over, to an iron that you described yesterday as being a grab-iron.

A. Yes, they call them a grab-iron.

[fol. 74] Q. Will you show that to the jury?

A. This is it right here. It is put on there for a step. They commonly call them a grab-iron. It is put on there for a step.

Q. What do you use the iron for?

A. For a step up. You can step from here on this beam across here. This beam that comes across here comes out from the tank.

Mr. Black: May the record show he indicates the beam, that heavy timber that runs just below the pin lifter that was described to the jury yesterday.

Q. You say that beam protrudes out from the end of the tender?

A. Yes.

Q. About how far?

A. From six to eight inches. It varies.

Q. Six to eight inches?

A. Yes.

Q. I call your attention to the heavy iron rod, the top iron rod that runs above the pin lifter.

A. Yes.

Q. What do you use that for?

A. It is to hold onto. We use them when we are out in the yards switching, to hold onto, when we are riding around. That is for the purpose of taking hold of it, with your hands.

Q. You may state whether or not, in the course of your employment as a hostler, or a hostler's helper and fireman, you have occasion to cross from one side to the other of an engine coupled to a tender, and to pass over the drawbar?

A. Yes, many times I have had occasion to. I did so many times. It is a common practice to get off and go up that way.

Q. There is no effort at all?

A. I have had occasion to.

Q. Mr. Bruner, during the time that you were employed by the defendant corporation, did anyone ever give you any instructions concerning leaving or getting down from engines?

A. No sir.

[fol. 75] Further recross examination.

By Mr. Bagley:

Q. Mr. Bruner, when you are working at night, you give signals by lantern; is that right?

A. Yes sir.

Q. And when you give the hostler a signal to move an engine, you, of course, expect him to act on that signal, don't you?

A. Yes.

Q. You expect him to move that engine?

A. Yes—if it is a signal to move.

Q. Yes; and you would not give that signal at any place, or any time, when the moving of that engine would injure you or anyone else, would you?

A. No.

Q. In other words, when you give him that signal to move that engine, you expect him to act on that signal?

A. Yes.

Q. And you do not give that signal when you are in a place where you could be injured by the immediate movement of the engine, would you?

A. No; if I was going to get struck, or something.

Mr. Bagley: That is all.

Redirect examination.

By Mr. Black:

Q. Did you make any attempt to give any signal while you were between 1149 and 1182?

A. No, absolutely not.

Q. Were you prepared, in any way, for the movement of these engines at that time?
A. No.

CHARLES JOHN COLOSIMO, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Jensen:

Q. State your name, please.
A. Charles John Colosimo.
Q. You spell that C-o-l-o-s-i-m-o?
A. Yes sir.
[fol. 76] Q. You reside in Grand Junction, Colorado?
A. Yes sir.
Q. How old are you, Mr. Colosimo?
A. Twenty-eight, now.
Q. You are employed by the trustees of The Denver & Rio Grande Western Railroad?
A. Yes sir.
Q. At Grand Junction, Colorado?
A. Yes sir.
Q. You are employed by them at the present time, are you not?
A. Yes.
Q. And you were in December, last year?
A. Yes sir.
Q. How long have you worked for the railroad?
A. You mean my full service?
Q. Yes.
A. I started the service with them in 1934.
Q. Did you start in the roundhouse?
A. Yes sir.
Q. In what capacity?
A. Engine house labor.
Q. Tell what jobs you held while you were in the roundhouse?
A. Engine labor job, and I got promoted to a boiler maker helper job.
Q. In December of 1941, in what capacity were you employed, Mr. Colosimo?

A. I was employed as a fireman.
Q. You were employed as a fireman?
A. Yes sir.
Q. But you were doing other work, were you not?
A. Yes sir.
Q. What was the nature of that?
A. Hostling engines.
[fol. 77] Q. Was that at Grand Junction?
A. Yes sir.
Q. Did you do hostler's work?
A. Yes sir.
Q. Did you do hostler's helper's work upon occasions?
A. Yes sir.
Q. At times I suppose you went out as a fireman?
A. No, I never went out firing at that time.
Q. You had not done any firing at that time?
A. No, I could not hold the board.
Q. In other words, you did not have enough seniority to get a fireman's job?
Mr. Colosimo, in December of 1941, how much time had you put in, in hostling and helping on hostling jobs at Grand Junction?
A. Two months.
Q. Two months?
A. No—just a minute—there is a mistake there—three months.
Q. Three months?
A. Yes sir.
Q. Did you know a man by the name of Mr. Bruner?
A. Yes sir.
Q. E. E. Bruner?
A. Yes sir.
Q. That is the same gentleman who sits here?
A. Yes sir.
Q. You worked with him one night, did you not?
A. Yes sir.
Q. He was your helper?
A. Yes sir.
Q. What was the date of that, please?
A. December 1st.
Q. Had you worked with Mr. Bruner prior to that time?
A. No, sir.

[fol. 78] Q. On that particular day, or morning—by the way, what time did you go to work?

A. Eleven o'clock p.m. on the 30th or 31st, I have forgotten how many days there are in the month.

Mr. Rawlings: There are thirty days in November.

A. Yes.

By Mr. Jensen:

Q. It was on November 30th, is that right?

A. Yes sir.

Q. What was the nature of the work you were doing—you and Mr. Bruner, at that time?

A. Taking engines out of the roundhouse and putting them in the roundhouse, conditioning them to go out on the road.

Q. In what capacity were you working?

A. As hostler.

Q. In what capacity was Mr. Bruner working?

A. Hostler's helper.

Q. Do you remember picking up a couple of engines—one No. 1182, and 1149?

A. Yes sir.

Q. Which of those locomotives did you see first, or did you work on first, or get on first?

A. 1149.

Q. Where was that locomotive when you got on it?

A. At the roundhouse.

Q. Was Mr. Bruner with you at that time?

A. Yes sir.

Q. Where did you take that locomotive?

A. To the cinder pit, to get the fire cleaned on it.

Q. Where is that cinder pit from the roundhouse?

A. It would be west.

Q. About how far?

A. About three blocks, I don't know how far in feet. It was quite a ways.

Q. The engine was in the roundhouse?

A. Yes sir.

[fol. 79] Q. You took it out of the roundhouse and down to the cinder pit?

A. Yes sir.

Q. You had to go across the turn-table, didn't you?

A. Yes sir.

Q. By the way, was Mr. Bruner with you when you went from the roundhouse to the cinder pit?

A. Yes sir.

Q. What did you take it down to the cinder pit for?

A. To get the fire cleaned on it.

Q. When you got down there did you men clean that fire?

A. Did we clean it?

Q. Yes.

A. No sir. They had men to do that.

Q. What are those men called?

A. Fire knockers—just fire knockers and fire cleaners.

Q. How long were you at the pit, do you remember?

A. Oh, I would say about ten minutes.

Q. When you moved from the pit—by the way, did you move 1149 away from the pit?

A. There was another hostler who hooked 1182 on the front end of it; then I moved them both back.

Q. Another locomotive had been hooked on the front end of 1149?

A. Yes sir.

Q. And the number of that locomotive was 1182?

A. Yes sir.

Q. What was the name of the hostler who brought that locomotive down there—was it Haynie?

A. Haynie.

Q. What had to be done with those locomotives?

A. They had to have the fire cleaned and sand put in the dome, and coal in the tender, and set in their places to go out, after we got through with them.

Q. After you got all that done it was your intention to take them down to put them in the place where they were to be used; is that right?

A. Yes sir.

[fol. 80] Q. Now, did you have a conversation with Mr. Bruner about what moves you intended to do?

A. I did, at the cinder pit.

Q. At the cinder pit?

A. Yes sir.

Q. Do you recall where that conversation took place, with reference to the cinder pit?

A. Do I recall where?

Q. Yes. I mean by that was it on the locomotive or to the side of the pit, or where?

A. It was on 1182.

By Mr. Black:

Q. On 1182, did you say?

A. Yes sir.

By Mr. Jensen:

Q. Do you recall where, on 1182, it was?

A. In the cab.

Q. In the cab. Now, will you state what was said between you and Mr. Bruner at that time?

A. I told him that the back engine, 1149, was already sanded, and the 1182 needed to be sanded, and I told him to sand the 1182 and coal 1182 and I would coal 1149 as we went by the coal chute.

Q. Was that all you said to him at that time?

A. Yes, I believe so. I told him for him to sand 1182 and stay on her and coal her, and at the same time I would take care of the 1149.

Q. All right—then what did you do?

A. I got back on the 1149, to run the engine back to the sand house.

Q. Did you have to go west from the pit to the sand house?

A. Yes sir.

Q. Was it dark?

A. Yes sir.

Q. About what time of the morning was this?

A. About five-thirty or five-twenty.

Q. When you went back to get on 1149, Mr. Bruner, I take it, was already in the cab of 1182?

A. Yes sir.

[fol. 81] Q. You had had this conversation in the cab; is that right?

A. Yes sir.

Q. Then you moved west?

A. Yes sir.

Q. You operated 1149?

A. Yes sir.

Q. As far as you know, was that the only engine on which any power was being used?

A. As far as I know, yes sir.

Q. By the way, was there any signal given to make that back-up movement?

A. Yes sir.

Q. Will you state what the signal was, and what was done?

A. After the cinder pit men told me the engine was okeh to go, I got up on the 1149 and whistled "back-up" for the cinder pit, to spot 1182 at the sand house.

Q. When you got down to the sand house what, if anything, took place?

A. Did anything take place?

Q. Yes, what did you do, or what was done with reference to these locomotives?

A. Mr. Bruner was up on the running-board of 1182, to give me a signal to stop at the proper place, to put sand in the 1182.

Q. And did you stop?

A. Yes sir.

Q. How long were you at that point?

A. Oh, I would say two minutes.

Q. What did you do while that stop was made?

A. I looked at the fire on the 1149.

Q. Then what was the next thing that happened?

A. Mr. Bruner got through sanding the 1149, and gave me a go-back signal, to go to the coal chute, which I moved back to the coal chute, and spotted the 1149, and got out and got up over the tender and put coal in the 1149.

Q. Now, Mr. Colosimo, how did you get from the cab of the locomotive up onto the tank of 1149?

[fol. 82] A. There is a step ladder on that side of the coal chute, I reached over and grabbed hold of the step-ladder and jumped right over into the tender of the 1149.

Q. Did you see Mr. Bruner after you saw him at the sand house?

A. Yes sir. Did you say if I saw him after that?

Q. Yes.

A. No sir.

Q. When was the last time you saw him?

A. After the sand house?

Q. No; when was the last time that you saw him?

A. The last time I saw him was on top of 1182, after he got through sanding.

Q. He was on top of 1182?

A. He was up on the running-board some place; I could not tell, it was dark, but he gave me the Go-back signal. That was the last time I saw him.

Q. When the spot was made at the coal chute, was there any signal given to you by Mr. Bruner?

A. When I spotted, do you mean?

Q. Yes.

A. No sir.

Q. I think you have already stated that you got on this step-ladder that was on the side of the coal chute, then up on the tank, and you coaled 1149?

A. Yes sir.

Q. Now, in coaling that locomotive, what did you do?

A. There is a chain that you pull down first, to lower your chute. After I lowered the chute, there is a chain you open to release the coal. I put about three tons of coal on it, and lifted the chute back up.

Q. When you were on 1182, up at the cinder pit, did you observe the condition of the coal pile on that tender?

A. Yes sir.

Q. Do you remember whether or not there was any coal in the tank?

A. Yes sir, there was some coal.

Q. Mr. Colosimo, do you remember how long it took you to coal 1149?

A. I would say it took me from the time I left the cab, till I got back in the cab, about three or four minutes.

[fol. 83] Q. Then what did you do?

A. After I got in the cab?

Q. Yes.

A. I released the air, looked out of the window, but it was dark, and started a back-up motion, to spot 1182.

Q. Mr. Colosimo, had you made that move, or a similar move, in the Grand Junction yards prior to this time?

A. The say- way?

Q. Yes.

A. Yes sir.

Q. Mr. Colosimo, you say you made that particular move before with two locomotives?

A. Yes sir.

Mr. Jensen: I will ask another preliminary question.

Q. What type of locomotives were those two that you had?

A. I have forgotten their class—220's, I believe; but 1100's is what we go by.

Q. But they are rather small locomotives, aren't they?

A. Yes.

Q. Is the tender large, or otherwise? What I am trying to get at, could you coal those two locomotives with one spot only?

A. If the tank was empty, you mean?

Q. No, I mean in the condition they were at that time?

A. Yes, with one spot.

Q. You would only have to spot them close, and put all the coal you needed in them?

A. Yes sir.

Q. Out of one spot; is that correct?

A. Yes sir.

Q. Is there anything unusual about your coaling the one, and Mr. Bruner coaling the other?

A. Anything unusual?

Q. Yes.

A. No, there was not. I have done it before.

Q. You have done it before?

A. Yes.

[fol. 84] Q. Have you seen it done by others?

A. Yes, I have.

Q. Mr. Colosimo, what is the custom and practice, or are you familiar with the custom and practice as to how hostler's helpers get from the front locomotive to the tank to take coal, in Grand Junction, during this period of time, how they would get from one point to another, in a move of this sort? Are you familiar with how that would be done, the custom as to how it would be done?

A. You mean after they have taken sand?

Q. Yes.

A. Well, the majority of them——

Q. Wait a minute, you don't understand my question. Do you know what that custom and practice was?

A. Do I know what it was?

Q. Yes, do you know how it was done?

A. Yes sir.

Q. How did the hostler's helper get onto the tank to take coal on that front locomotive, after moving from the sand house?

A. Most of them are over the cab into the tender.

Q. How do they get over the cab?

A. They climb up on the boiler and just step right up on the cab there.

Q. When they are up there at the sand house, they are already on top of the boiler, aren't they?

A. Yes sir.

Q. If they got down to the running-board would they go over this way, across the cab and down into the tank?

A. Yes sir.

Q. Now, Mr. Colosimo, this track that you were on, was that the track at the north of the coal chute?

A. North?

Q. Yes. It was on the city side of the coal chute, wasn't it?

A. Yes sir.

Q. That is north of the coal chute, isn't it?

A. Yes sir.

Q. In this move from the sand house down to the coal chute, which way were you going?

A. We were going west.

[fol. 85] Q. You were going west, and you were backing up?

A. We were backing up, yes sir.

Q. When you spotted your locomotive at this coal chute —there are two aprons on that coal chute, aren't there?

A. Yes sir.

Q. Which apron did you spot at?

A. The east end apron.

Q. That is the one nearest this side?

A. Yes sir.

Q. Nearest the direction from which you were coming?

A. Yes sir.

Q. When you spotted at that east end apron, which part of the locomotive did you put under the apron?

A. The tender.

Q. The coal holding portion of the tender; is that right?

A. Yes sir.

Q. On this locomotive where would that be—about over this center part, about where I have indicated—or would it be farther back?

A. On that one it is about the center of where the coal is missing from.

Q. About the center of where the coal is missing from?

A. Yes.

Q. So the coal would roll either way and fill up the whole space; is that correct?

A. You misunderstand me there. I mean if the tender has some coal in it.

Q. Yes—well, on this occasion where was the tender spotted with respect to the apron?

A. It was spotted just where you have the marking there.

Q. All right, and that is about midway in the section holding coal; is that correct?

A. Yes sir.

Q. Do you remember about what the dimensions are of that section of the tank that holds coal, from front to back—your best judgment on that, Mr. Colosimo?

Mr. Jensen: I will withdraw that question for the moment.

[fol. 86] Q. About how long are those tenders, do you know?

A. How long are those tenders?

Q. Yes.

A. I would say fifteen feet long.

Q. And this part that holds the coal, how far does that run back from the front to the back of the tender?

A. It runs back about eight feet.

Q. A little better than half way, is that your judgment?

A. Yes sir.

Q. So that if you spotted it about midway, the apron would be about four feet from the front part of the tender; is that right?

A. Yes sir.

Q. Were the boiler and the cab of the locomotive east of the coal chute, or how were the boiler and cab—how were they situated with respect to the coal chute?

A. Part of the boiler was sticking on the east end of the coal chute.

Q. What is your judgment as to the length of the boiler, including the cab?

A. About thirty feet.

Q. What is your judgment as to how much the locomotive extended east of the coal chute?

A. I am not very good at figuring off-hand.

Q. Would you say half, or a third, or have you any judgment on it at all?

A. Oh, it was over half of the boiler that was sticking out past the coal chute.

Q. So, at least fifteen feet of the boiler was extending east of the coal chute; is that correct?

A. Yes sir.

Q. And then east of the front end of the boiler was the other locomotive?

A. Yes sir.

Q. 1182?

A. Yes sir.

Q. Mr. Colosimo, this apron that comes down, what is it, a sort of a steel slide—is it a piece of steel that comes down to the coal chute, that is lowered into the locomotive so you can run the coal into it?

[fol. 87] A. Yes sir.

Q. Does it have sides on it?

A. Yes sir.

Q. Is it a form something like a scoop shovel, except on a larger scale, with sides on it, the flat part or opening on the front?

A. It has sides, it is a flat piece of steel with sides on it and a hole in the bottom of it and one end where the coal drops down.

Q. It works on a hinge, so it can be raised or lowered; is that correct?

A. Just by weights.

Q. When you spot, where was that ladder that you took hold of to get onto the top of your locomotive or the top of your tank, rather?

A. Where was it?

Q. Yes, where was it with respect to your cab?

A. You mean where it was when I was on the cab?

Q. Yes, when your locomotive came to a stop did you have to reach for the ladder?

A. Yes sir.

Q. Did you get onto the ground at all?

A. No sir.

Q. All right, you tell us about it then, Mr. Colosimo; you tell us how you got up that ladder?

A. The ladder—I got down on the gangway of the engine and reached over and got hold of the ladder with my left arm or hand, and climbed up and jumped into the tender.

Q. Which side of the locomotive was the coal chute on?

A. Which side?

Q. Yes.

A. It was on the right side.

Q. Is that the fireman's side or the engineer's side?

A. The engineer's side.

Q. In operating this locomotive where were you sitting as you were moving back on the engineer's side, or the right side? Will you tell us more about that ladder that was on the side of the coal chute? Was it leaning against the coal chute, or a part of it—tell us about that?

[fol. 88] A. The ladder is built right onto the coal chute. It is always there.

Q. What is it made out of—wood—or is it rungs of iron?

A. Rungs of iron.

Q. Does it go clear to the ground, or start up above the ground?

A. It starts up above the ground.

Q. Those rungs of iron, are they something like the handholds you have on box cars?

A. Yes sir, just small, little rungs.

Q. A piece of iron about that shape, would it be?

A. No, they were sort of like a pipe, running from one side to the other.

Q. How were they held onto the side of the coal chute?

A. I don't recall now whether they are made out of steel or wood.

Q. Now, Mr. Colosimo, going back to the time when you had completed the coaling of 1149, and got down in the cab, I think you said you released the brakes and started to back up; is that correct?

A. Yes sir.

Q. You tell us what happened from then on?

A. After I released the brakes and put the engine in reverse, reversing position, I opened the throttle, to go backwards, to spot 1182. After I started back a little ways I heard someone's cries to stop the engine at once.

Q. You heard someone what?

A. Someone cry or holler "Help." I stopped the engine and looked down one side, and could not see nothing; then looked down the other side. In other words, I looked down one side and could not see nothing, so I got down on the engineer's side and ran up toward the front of the engine, and found Mr. Bruner on the ground.

Q. Did you have a headlight burning on either front or rear of 1149?

A. I have the back-up on the 1149.

Q. Did you have a headlight burning on either front or rear?

A. Of 1182. The beam headlight was on.

Q. The headlight of 1182, and the rear light of 1149?

A. Yes sir.

Q. You say you found Mr. Bruner on the ground?

A. Yes sir.

[fol. 89] Q. Tells us where he was, place?

A. He was at the front of the 1182, towards the front of 1182, about three feet from the track, on the right side?

Q. On the engineer's side?

A. Yes sir.

Q. Did you see a lantern there at that time, or anywhere around him?

A. No sir.

Q. You did not?

A. No.

Q. Did you later see a lantern around there?

A. We found one later, after we sent Mr. Bruner to the hospital.

Q. Where did you find the lantern?

A. It was on the left-hand side of the tracks.

Q. Whereabouts from where you found Mr. Bruner, have you any idea?

A. No, it was farther east from where we found Mr. Bruner—no, let us see—I am getting my directions mixed up here. It was farther west than we found Mr. Bruner.

Q. It was nearer to the coal chute than where you found Mr. Bruner?

A. Yes.

Q. Have you any idea how much nearer?

A. I would say an engine length, practically an engine length.

Mr. Bagley:

Q. That is about seventy feet, isn't it?

A. Yes sir.

By Mr. Jensen:

Q. All right. Now, Mr. Colosimo, after you found Mr. Bruner what, if anything, did you do?

A. What did I do?

Q. Yes.

A. I asked him what was the trouble, and he told me his leg had been run over; so, it being my first experience with anybody hurt, like that, I did not know what to do, and I ran toward the cinder pit and found hostler Haynie there, and told him, and we both ran back up there and got Mr. Bruner. There happened to be a car there by the coal chute that belonged to a machinist. We got him to take Mr. Bruner to the hospital.

Q. When was it you found the lantern?

A. When?

[fol. 90] Q. Yes.

A. It was ten or fifteen minutes after it happened there, we were taking a few of the officials around the place.

Q. Was it after you got Mr. Bruner in the car?

A. Yes sir.

Q. What kind of a lantern was it?

A. Electric lantern.

Q. A regular swtchman's lantern?

A. Yes sir.

Q. Was anyone with you when you found it?

A. I did not find it myself—I was with someone when they found it. Haynie found it, the other hostler.

Q. Did he pick it up, off the ground?

A. Yes sir.

Q. Was it lighted?

A. I don't recall whether the lantern was lit or not, I don't believe it was lit.

Q. Did you see the lantern, examine it?

A. No, I did not examine the lantern.

Q. Could you tell us whether or not any part of it was broken?

A. No, I could not tell you that, I did not even look at the lantern.

Q. Did Haynie make any remark about the lantern being his, or anything of that sort?

Mr. Black: Being his?

Mr. Jensen: Yes.

Mr. Black: I think we stipulated it was his lantern.

The Court: Yes.

Mr. Bagley: That is all right.

Mr. Rawlings: Bruner testified to that.
Mr. Jensen: Yes.

By Mr. Jensen:

Q. But Haynie picked it up?
A. Yes sir.
Q. You saw him pick it up?
[fol. 91] A. No, I never saw him pick it up, but I saw him with a lantern that he said he picked up.
Q. You told us here a little while ago that the lantern was probably an engine length away?
A. That is where Mr. Haynie told me he picked it up.
Q. But you did not see him pick it up?
A. No.
Q. Mr. Colosimo, on an occasion like that, particularly night, where you are the hostler, and someone else is helping you, whose duty is it to decide how moves are to be made, and to direct the moves?
A. The hostler usually directs the movements.
Q. Is the hostler the boss of the two?
A. Yes sir.
Q. All right. Now, what are the hostler's usual duties?
A. The hostler's duties are to run the locomotive, and to keep the fire in it, and water in it.
Q. What?
A. To keep fire and water in it.
Q. What are the duties of the helper?
A. The helper is to coal engines, sand engines, take water on them, operate the turn-table and throw switches.
Q. Does he do such things as the hostler directs?
A. Yes sir.
Q. On this particular occasion, when you coaled No. 1149, could you have directed Mr. Bruner to do that work?
A. Yes sir.
Q. Is it any part of the hostler helper's duties to check water and check fires, and things of that sort?
A. It isn't their duty, but they help to do it once in a while, just like the hostler helps the helper to do once in a while.
Q. Whose responsibility is it, and who is held responsible for the condition of the fire and the condition of the water, and so on?
A. The hostler.

Q. When you were in the cab of engine 1182, down at the cinder pit, did you say anything with respect to checking the fire and the water?

A. Did I say anything?

[fol. 92] Q. Yes.

A. No, sir; they had not quit operating them yet.

Q. Did you do anything about it, before the move was made?

A. No sir.

Q. You did make a check about the coal that was in the tank of 1182, didn't you?

A. Yes sir.

Q. Do you recall whether or not 1182 is a hand fired locomotive?

A. Yes sir.

Q. Of course, it means that you have to fire it by throwing coal in through the door with a shovel?

A. Yes sir.

Q. There are two kinds—stoker fired and hand fired?

A. Yes sir.

Q. Mr. Colosimo, 1182 and 1149, are those engines more or less alike?

A. Are they what?

Q. Are those engines alike?

A. Alike?

Q. Yes.

A. Yes, they are both the same class of engine.

Q. But one of them is used in road service?

A. Yes sir.

Q. The other one in switching service?

A. Yes sir.

Q. I call your attention to Exhibit "1"—which is a picture of the front end of 1182. You will notice that has a part of a pilot on it?

A. Yes sir.

Q. You don't notice any such pilot on the picture of 1149, shown in Exhibit 3, do you?

A. No sir.

Q. The reason for that pilot, of course, is because 1182 is in road service, isn't that right?

A. Yes sir.

[fol. 93] Q. Would you say that the dimensions of 1182 are the same dimensions as you gave us as to 1149?

A. The same length?

Q. The same dimensions. I mean, is the overall length the same, or substantially the same, as you remember it?

A. From coupler to coupler, I believe they would be the same dimensions.

Q. How about the tanks?

A. The tanks would be the same.

Q. I don't know whether I asked you this, or not, but was 1149 a hand fired locomotive, too?

A. Yes sir.

Q. Mr. Colosimo, I hand you what has been marked for identification as defendants' Exhibit No. 4, and I will ask you if you recognize that photograph?

A. Yes, I do.

Q. What would you say it is a photograph of?

A. It is a photograph of the city side of the coal chute, and the river side of the sand house.

Q. And looking from where to where?

A. Looking toward the roundhouse, but you don't see the roundhouse. It is in that direction.

Q. You are looking from the coal chute towards the sand house, aren't you?

A. Yes sir.

Mr. Jensen: We offer it if your Honor please.

The Court: Which number is that?

Mr. Jensen: No. 4.

The Court: It may be received.

(Here follows 1 photolithograph, Exhibit "4")

Q. Mr. Colosimo, I call your attention particularly to the ladder which appears here at the side of the coal chute?

A. Yes sir.

Q. Is that the ladder you went up?

A. Yes sir.

Q. I call your attention to Exhibit "5," and ask you if you recognize that photograph?

A. Yes sir.

[fol. 94] Q. Will you tell us what it is?

A. That is the coal chute at Grand Junction, the east side of the coal chute.

Q. And looking which way?

A. Looking west.

Q. That is, that photograph is taken in a position of the camera standing about here, looking down this way?

A. Yes sir.

Q. That man standing there is you, isn't it; you were present when that picture was taken, weren't you?

A. Yes sir.

Mr. Jensen: We offer it if your Honor please.

The Court: It may be received.

(Here follows 1 photolithograph, Exhibit "5")

Q. And on this particular photograph you can see the ladder, can you not?

A. Yes sir.

Mr. Jensen: I think that is all.

Cross-examination.

By Mr. Black:

Q. Mr. Colosimo, had you been employed as a hostler's helper during this three months' period of time that you mentioned?

A. I helped hostler the first two days that I hired out down there. Two times I helped hostler, out of that three months.

Q. Had you acted as a hostler during those three months?

A. Yes sir.

Q. How many times or how often?

A. Every day for the three months.

Q. Every day you had been a hostler, for three months?

A. Yes sir.

Q. And this is the first time, of course, that you had ever worked with Mr. Bruner, you stated?

A. Yes sir.

Q. Mr. Colosimo, when a hostler and his helper work at night, you stated the hostler operates the engine?

A. Yes sir.

Q. And he depends on the helper for signals controlling the various movements that you make with the engine, does he not?

A. Yes sir.

[fol. 95] Q. If you are going to go through a switch the helper throws the switch and signals you through?

A. Yes sir.

Q. If you are going to leave the cinder pit, going either toward the roundhouse or toward the sand house, the hostler operates the engine, and the helper gives the signals?

A. Yes sir.

Q. And, of course, you both work together and depend upon each other, do you not?

A. Yes sir.

Q. And on this night you depended upon Mr. Bruner to give you a signal so that you could stop that 1182 under the sand spout?

A. Yes sir.

Q. And he did give you a signal?

A. Yes sir.

Q. And he signaled you with a lighted lantern, did he not?

A. Yes sir.

Q. And you operated on that signal and stopped the engine?

A. Yes sir.

Q. You waited there until a certain process was completed, and you got another signal, and you proceeded back towards the coal chute?

A. Yes sir.

Q. Of course, at the time that you brought those engines to a stop there at the sand house, you were looking toward Mr. Bruner?

A. Yes sir.

Q. You were looking eastward there, weren't you, toward Mr. Bruner?

A. Yes sir.

Q. As you went back toward the coal chute you were looking west, weren't you, you were looking back to the coal chute?

A. Yes sir.

Q. You determined whether you should stop the tender of 1149 underneath the first coal chute or the second, didn't you?

A. Yes.

Q. You are the one that made that determination?

A. Yes sir.

[fol. 96] Q. And, of course, you did not depend on anybody to give you a signal for that at all, did you?

A. No sir.

Q. And that was a part of the pre-arranged plan that you had before that movement left the cinder pit?

A. Yes sir.

Q. When you stopped 1149 there at the coal chute, you did not go back out of the cab up on top of the engine, and up onto the tender, did you?

A. Did I what?

Q. When you stopped 1149 there at the coal chute, you did not get out of the cab onto the running board, on the running board up on top of the cab and over on to the tender, did you?

A. No sir.

Q. You found another way of doing it that suited your purposes better?

A. Yes sir.

Q. So you got hold of the ladder, climbed up the ladder, I suppose, and swung over onto the tender?

A. Yes sir.

Q. You never gave Mr. Bruner any instructions as to how he should get in and out of the engine, or what he should do, other than to work with you in this movement?

A. No sir.

Q. You never told Mr. Bruner how he should get down?

A. Down from one gangway onto the other?

Q. You did not tell him to go out of the window, up on top of the cab, on to the tender; you did not do that at all, did you?

A. No sir.

Q. The fact of the matter is, that was just up to him?

A. Yes sir.

Q. You testified you thought a majority of the helpers, most of them, when they were going back to take coal, got out of the window, on the running-board, on top of the cab, from there over onto the tender?

A. How was that? You say if they were on top?

Q. Yes.

A. I say if they were on top of the boiler, where Mr. Bruner was, they would just keep on going, on over the cab.

[fol. 97] Q. I misunderstood the testimony there, Mr. Colosimo. So then your testimony was that when the helper is on top of the boiler, the ordinary movement would be on top of the cab and then from there over onto the tender?

A. Yes sir.

Q. I see. Now, that isn't true when the helper is in the cab, then, is it? I mean that is not the ordinary movement, where the helper is in the cab?

A. No.

Q. And when the helper is in the cab he gets down on one side, from one gangway to the other?

A. Yes sir. Some of them—they have so many ways of working—some of them crawl up over the gates and get into them.

Q. It is more or less up to the helper what he does?

A. Yes sir.

Q. You do not pretend to tell the helpers how they should do this part of their work?

A. No sir.

Q. Nobody ever pretended to tell you how to do it when you were a helper?

A. No sir.

Q. You did not move those engines, after the sand had been taken on 1182, till you got a signal, did you?

A. No sir.

Q. When you got that signal you saw Bruner there near the sand dome?

A. Yes sir.

Q. That is the last time you saw him till you discovered him there near the front of 1182, isn't it?

A. Yes sir.

Q. You heard his cries, and you went back towards the front of the engine, and discovered a man. That was the first time you saw him since you talked to him?

A. Yes sir.

Q. When you put that 1149 in reverse and opened up the throttle to start that backward movement, you did not know where Mr. Bruner was?

A. I did not see him, but I thought he was on top of the tender.

Q. But you did not know where he was?

A. I did not see him, no.

Q. You did not see him on top?

A. No.

[fol. 98] Q. You did not know where he was. That is true, is it not?

A. Yes sir.

Q. Now, the hostler, of course, sits, as you have stated, here at the right side of the cab?

A. Yes sir.

Q. That is the engineer's side; that is the hostler's side?

A. Yes sir.

Q. You were there at the right side of the cab when you put in the throttle and commenced that back-up motion?

A. Yes sir.

Q. At the coal chute?

A. Yes sir.

Q. Could you see the top or upper part of the tender of 1182 from where you were?

A. Most of it, yes sir.

Q. And that was within the range of your vision?

A. It was dark, I could see where it was. You could not see if anyone was there unless they had a light or something.

Q. Of course not, and you assumed that Bruner was there. You opened up the throttle and started back?

A. Yes sir.

Q. You did not sound any whistle or ring the bell before you started?

A. No sir.

Q. Mr. Colosimo, were you familiar with the safety rules of the company at that time?

A. Yes sir.

Q. Were you familiar with that safety rule No. 2057, which provides that the engine bell or whistle warning must be given before engines are moved, and then wait at least one minute; are you familiar with that rule?

A. Yes sir.

Mr. Black: That is all. Thank you.

Redirect examination.

By Mr. Jensen:

Q. Mr. Colosimo, the last time you saw Mr. Bruner he was on the boiler of 1182; is that correct?

A. Yes sir.

[fol. 99] Q. You knew he had to get onto the tank of 1182, didn't you?

A. Yes sir.

Q. What was the ordinary way for a man to get to that tank under those conditions as they existed that night, for a hostler's helper to get from the boiler of 1182 to the tank of 1182?

A. That night it seemed to me it would have been, over the cab into the tender would have been the easiest of the bunch, being already up there on the boiler, just like I stated before.

Q. Mr. Colosimo, at the time you talked with Mr. Bruner, back at the cinder pit, about what you were going to do, did you say anything to Mr. Bruner as to where he should be and stay?

A. I just told him to stay on the 1182. That is what I told him, just to stay on the 1182, and I would take care of the 1149.

Mr. Jensen: That is all.

Recross-examination.

By Mr. Black:

Q. All you meant by that was that you would take care of 1149, and Bruner would take care of 1182?

A. Yes sir.

Q. By the way, one question: Where is the valve that turns off the blower in the cab of this engine?

A. The valve?

Q. Yes.

A. It is on the fireman's side.

Q. On the left side?

A. Yes sir.

Mr. Black: That is all.

JUDGE'S CERTIFICATION TO BILL OF EXCEPTIONS—August 15, 1942

I, GEORGE A. FAUST, do hereby certify that I am one of the judges of the above entitled court and the judge before whom the above entitled cause was tried; that the defendants' proposed bill of exceptions consisting of:

1. The official court reporter's transcript of the evidence introduced and the proceedings had in said cause containing 238 pages marked 1 to 238 both inclusive;

[Fol. 100] 2. Three additional pages marked 239 to 241 both inclusive, which pages are attached to said transcript; and

3. The exhibits introduced in evidence upon the trial of said cause, which exhibits are attached hereto and made a part of this bill of exceptions;

contains all of the evidence offered or received at the trial of said cause and all of the exceptions taken and rulings made and the proceedings had in the course of said trial.

Said bill of exceptions, having been served within the time required by law and the orders of this court and no additions, corrections or amendments thereto having been offered or proposed by the plaintiff within the time required by law, is now signed, settled and allowed as and for the defendants' bill of exceptions in the above cause.

Dated this 15th day of August, 1942.

George A. Faust, Judge. (Seal.)

Attest: Alvin Keddington, Clerk. By ———, Deputy Clerk.

[fol. 101] IN THE SUPREME COURT OF UTAH

No. 6566

E. E. BRUNER, Plaintiff and Respondent,

v.

WILSON McCARTHY AND HENRY SWAN, Trustees of the Denver & Rio Grande Western Railroad Company, and the Denver & Rio Grande Western Railroad Company, Defendants and Appellants

OPINION—Filed October 25, 1943

Wolfe, Chief Justice:

E. E. Bruner, plaintiff and respondent, who was employed as a hostler's helper on the railroad of the defendants, was injured in the course of his employment. He commenced this action under the Federal Employers' Liability Act, 45 U. S. C. A. 51, to recover damages from his employers for these injuries. The trial resulted in a verdict and judgment in favor of the plaintiff. The defendants appealed.

All assignments of error, except one relating to the admission in evidence of Exhibit G, relate to various instructions given to the jury. By several of the assignments the defendants urge that the jury was not properly instructed on the issue of contributory negligence, which

defense was pleaded by the defendants. The Federal Employers' Liability Act provides that:

> "* * * the fact that the employee may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in the proportion to the amount of negligence attributable to such employee."

It is contended that the various instructions did not correctly submit this factor to the jury. The plaintiff counters that there was no evidence of contributory negligence and that no such instructions were required. Our first question then is whether there was sufficient evidence of contributory negligence to require the giving of an instruction relating thereto.

The evidence adduced is not in dispute. Prior to the accident the plaintiff had had several years' experience both as a hostler and hostler's helper. On the date of the accident, December 1, 1941, he was working for the defendants as a hostler's helper. He was assigned to aid and assist one Colosimo, a hostler, with whom the plaintiff had not previously worked. Colosimo was in charge and the plaintiff was to perform his work as directed by Colosimo. On this railroad the hostler and his helper serviced locomotives and delivered them from the roundhouse to the railroad crews.

On December 1, 1941, the plaintiff came on shift with Colosimo at 11 p. m. After performing various other duties, they brought Engine No. 1149 out of the roundhouse to the [fol. 102] cinder pit. Here employees known as "fire knockers" cleaned the clinkers out of the fire. While they were at the cinder pit, another hostler brought Engine 1182 from the roundhouse and coupled it to Engine 1149. Both engines were facing east. At the cinder pit Colosimo and the plaintiff discussed the future movements of the engines and the work to be done. Engine 1149 did not need sand. It was decided that both engines were to be backed to the sand chute where the plaintiff would take sand on 1182. Then both engines were to be backed to the coal chute. Although it was plaintiff's duty to put coal in the tender of both engines, Colosimo volunteered to coal Engine 1149 and told plaintiff to coal Engine 1182 after he had sanded it. Pursuant to this conversation plaintiff boarded Engine 1182

and Colosimo boarded 1149. Plaintiff gave Colosimo a back up signal and Colosimo testified that he answered with a whistle "back up" signal before starting the engine. By using the power on Engine 1149, both engines were backed toward the sand tower and upon a signal from the plaintiff, 1182 was stopped so that it could be sanded. After plaintiff sanded Engine 1182 he returned to the running board on the side of the engine and gave Colosimo the signal to back the engines toward the coal chute. Engine 1149 which was to be coaled by Colosimo was first spotted at the coal chute —this time it was stopped without a signal from the plaintiff. Colosimo coaled Engine 1149, taking about three or four minutes for the job. While Colosimo coaled Engine 1149, plaintiff, who was still in the cab of Engine 1182, checked the fire and turned off the blower. He then got off the engine on the north side (the side away from the coal chute) and walked to the rear of the engine toward the tender. In order for the plaintiff to take coal on Engine 1182 it was necessary for him to be on top of the tender. There were several methods by which he could have climbed there. At the point where he was standing at the rear of the north side of the tender there was no ladder leading to the top of the tender. However, immediately across from this point on the rear of the south side of the tender there was such a ladder. To reach this ladder there were at least two direct methods he could have used. One would have been to cross over the pilot (a flat platform on the front of the engine) on Engine 1149. The other way, the way he chose to go, was to climb over the draw bar between the two engines which were coupled together. While he was climbing over this draw bar, Colosimo, without warning or without knowing where the plaintiff was or receiving a signal started the engines. Plaintiff was thrown beneath the wheels of one engine and his left leg was cut off at a point below the knee.

The defendants claim that the plaintiff was guilty of contributory negligence in that of the several ways by which he could have climbed to the top of the tender, he chose the only dangerous one; that the way chosen was not customarily used and was highly dangerous. Defendants also contend that the plaintiff, who was to follow Colosimo's directions, had been ordered by Colosimo to stay on Engine 1182; that if he had obeyed this order he would not have been injured; and that Colosimo had a right to assume that the

plaintiff would obey this order. One difficulty with this position is that the record does not support it. There is no testimony tending to show that it was more dangerous to mount the tender in the manner chosen by the plaintiff. Defendants apparently rely on Exhibit 3 which is a picture of these two engines coupled together. This picture shows the draw bar and other items relating to the hand holds, etc., on the route which the plaintiff chose. However, we cannot from this picture conclude that the manner chosen was highly dangerous and a method not customarily used. The evidence merely shows that there were several ways by which the plaintiff could have gotten on top of the tender. The manner in which he was to get there was left to his [fol. 103] own judgment. The record does not show that the way he chose was the more dangerous way. Nor does the evidence show that Colosimo ordered the plaintiff to stay on Engine 1182. True Colosimo did testify that "I just told him to stay on 1182. That is what I told him, just to stay on 1182, and I would take care of the 1149". But it is clear that what he meant by this was merely that plaintiff should confine his work to 1182 and Colosimo would take care of 1149; for in response to the question: "All you meant by that was that you would take care of 1149 and Bruner would take care of 1182?", Colosimo answered: "Yes, sir." This interpretation of this statement is further borne out by the remainder of Colosimo's testimony.

We have then this situation: These two men, working together for the first time, were stopping and starting the train according to signals given by the plaintiff. The engines were stopped; Colosimo was putting coal in Engine 1149. It was the plaintiff's duty to get on top of the tender on Engine 1182. He chose a manner of getting there which is not shown by the evidence to be either unusual or dangerous. In fact, the only evidence is that which he gave that he had often used this route and that it was a common practice among yardmen to do so. Colosimo, without giving a signal or without knowing where the plaintiff was, started the engines and threw the plaintiff to the tracks and under the wheels of one engine. The plaintiff was doing exactly what he was required to do in the performance of his duties; to-wit, getting on top of the tender. While it may be, as defendants argue in their brief, that the manner chosen was highly dangerous, there is no evidence to show

this. We must conclude that the record does not show contributory negligence.

Even if there were several means of reaching a point where plaintiff was required to be and one was more safe than the others but all were reasonably safe without movement of the engine and the plaintiff had a right to rely on the engineer and assume that he would not start the engine until he received a signal, we do not think the choice of the less safe route could be considered as having contributed to the accident when it was apparent that the unexpected jar caused by the engine's movement dislodged the plaintiff. Even had the latter chosen the safest route, a jar which he had a right not to expect, and in regard to such non-expectation it could be presumed he would have regulated his holds and care of traversal, the dislodgment might have happened. This is a case where the parties were members of a working crew working on signals designed for the very safety of that work. Where the accident has been caused by the failure to give such signal the party working in a crew responsible for such omission will not be heard to say that the injury suffered could have been avoided had the injured party conducted himself on the assumption that the signal would not be given; that the consequences of the delict could have been avoided had the injured party, as appears from hindsight, so conducted or positioned himself as to make the delict inconsequential. There are perhaps few instances of accidents in industry where one party injured by the negligence of another might not, had he been warned of the negligence, have placed himself in more advantageous position to avoid its consequences. One of the criteria in determining the standard of care required in industry to fend off a defense of contributory negligence is not one fashioned by the imagination of judges sitting in their chambers but one measured by the conduct and practices of the average experienced workman engaged in that industry in relation to others working with him in their immediate joint enterprise under the system of signals designed for the safety of such parties engaged in the enterprise. The care which a prudent person will exercise not to injure others and that which he [fol. 104] will exercise in order to protect himself from the uncontemplated action of others are not necessarily governed by the same circumstances. One for whose benefit such signal is to be given, may while in the conduct of the enterprise, rely on the other to give it; and the latter may

not, where the other has acted according to the standard set by the accustomed behavior under such mutual undertakings, urge that greater care would have avoided the consequences of his omission to give the signal.

It is admitted by the defendants that certain rules for the operation of trains were put in effect by them, but they argue that these safety rules, which were relied on by the plaintiff to show negligence, were not designed for the protection of employees engaged in operations such as those in which plaintiff and Colosimo were engaged. One of these Safety Rules, Sec. 2057, provided:

> "Engine bell or whistle warning must be given before engines are moved, then wait at least one minute."

The other, Sec. 30, provided:

> "The bell must be rung when an engine is about to move and while approaching and passing stations, tunnels, snow sheds and public crossing at grade."

This latter section was under consideration recently by the United States Supreme Court in the case of Owens v. Union Pacific R. Co., 63 S. Ct. 1271, June 14, 1943. It was there argued that Sec. 30 had no application to the switching operations involved. The majority of the court held that it was unnecessary for them on certiorari to decide this question because it had not been considered by the Court of Appeals. However, three justices dissented on the grounds that the evidence showed "without contradiction that Rule 30 was not applicable to these switching operations and that it was the practice of switching crews under the circumstances of this movement to 'kick' the cars without waiting for a signal from the man in decedent's position at the switch." There is, therefore, considerable doubt that these rules had any application to the operations undertaken by plaintiff and Colosimo.

It is, however, unnecessary to decide this question for even without the rules, the evidence conclusively shows negligence on the part of Colosimo. The plaintiff, in outlining the practice followed in operations of this type stated:

> "Whenever it is to be moved they get a proper signal to move and then give the signal to warn anybody that the engine is to be moved, either a whistle or a bell, it is usually the whistle around there. After they get

the signal, that is, from the hostler's helper, they will give the proper signal from the engine that is about to be moved.

"Q. Do you know whether or not these signals, both from the hostler to the helper and the helper to the hostler, were used in the movement of the engines in the yard at Grand Junction, during the time you were working there?

"A. Yes, they were in effect, I always used them and worked by them.

[fol. 105] "Q. Prior to the time this accident occurred, do you recall any occasion when the signals were not used?

"A. No, I don't. I always worked according to signals, that is what we have to move by, is signals."

The testimony of Colosimo, who was called by the defendants, also seems to support the view that it was customary to move engines in this type of an operation according to signals between the hostler and the hostler's helper. His testimony shows that after he and the plaintiff discussed the proposed movement of the engines, he boarded 1149 and the plaintiff boarded 1182. He then stated:

"A. After the cinder pit men told me the engine was okeh to go, I got up on 1149 and whistled 'back up' for the cinder pit, to spot 1182 at the sand house.

* * * * * * *

"Q. When you got down to the sand house what, if anything, took place?

"A. Mr. Bruner was upon the running-board of 1182, to give a signal to stop at the proper place, to put sand in the 1182.

* * * * * * *

"Q. Then what was the next thing that happened?

"A. Mr. Bruner got through sanding the 1149, and gave me a go back signal, to go to the coal chute, which I moved back to the coal chute, and spotted the 1149, and got out and got up over the tender and put coal in the 1149.

"Q. When the spot was made at the coal chute, was there any signal given to you by Mr. Bruner?

"A. When I spotted, do you mean?

"Q. Yes.
"A. No sir."

This evidence is not contradicted. In fact it would seem that the practice had its birth in necessity. If the crew member operating an engine were to move it without signal from his co-worker when he knew the latter was engaged about the train at a point where he could not be seen, we might expect yard accidents to multiply greatly. There is also no dispute concerning the fact that Colosimo did not get a signal from his helper, the plaintiff, to back up so that 1182 could be coaled; nor did he give a whistle signal. It is also admitted that this sudden start caused the plaintiff to fall to the tracks. The hostler and his helper customarily moved the trains by signals between themselves. Colosimo started the train without either getting a signal from the plaintiff or giving a whistle or bell signal himself. It was dark and he could not see the plaintiff nor did he know where the plaintiff was. Moving the train under these circumstances was negligence even apart from the safety [fol. 106] rules. Since the evidence on negligence is such that the court could have directed a verdict for the plaintiff, it was not prejudicial error for the court to give instructions on these safety rules even though said rules may have had no application to this situation.

By the next assignment it is claimed that the court authorized the jury to assess double indemnity by instructing (in part) that:

> "You are instructed that if you find the plaintiff is entitled to recover, you may award him such damages not exceeding the sum of $75,000.00 as in your opinion will compensate him for the pecuniary damages proved to have been sustained by him and proximately caused him by the wrong complained of; and in estimating the amount of such damages you may consider the physical and mental pain suffered, if any, the nature, extent, and severity of his injury or injuries, if any, the extent, degree, and character of his suffering, mental or physical, if any, its duration and its severity, *and the loss of wages and future earnings and impairment of earning capacity, if any, his loss of power and capacity to work, if any, and its effect upon his future.*
>
> "You may also consider whether the injury was temporary in its nature or is permanent in its character,

and from all these elements you will resolve what sum will fairly compensate plaintiff for injuries sustained."

It is contended that the portion of the instruction which we have italicized permits the jury to grant double recovery for a single loss; that it permits the jury to consider lost earnings, past and future, in addition to loss of earning capacity and power and capacity to work when the former is necessarily included in the latter.

It would perhaps have been better had the court made it more clear to the jury that these various items covered substantially the same loss and that the plaintiff would be entitled only to that amount which would fairly compensate him for the loss of earnings. However, we do not think that the jury could have been misled by the instruction given. In Instruction 9 the jury was told that "in considering the element of the loss of wages and future earnings, if any, which plaintiff may sustain in the future on account of the loss of his leg, you may * * * consider and determine from the evidence the loss or impairment of plaintiff's earning power, if any, resulting from his injury". Thus Instruction 9 in effect told the jury that loss of wages and future earnings were included in a consideration of impairment of earning power. And further, it does not appear from the instruction quoted above that the jury could have understood that it could assess damages for both loss of wages, past and future, and in addition give damages for impairment of earning power. There was no evidence of impairment of earning power except as reflected in the loss of wages, past and future. It would be attributing to the jury more than ordinary lack of comprehension to assume that it would find loss of earnings and then on the same evidence double it for impairment of earning power and then perhaps triple it for loss of power or capacity to work. If it had looked around for different evidence to support an additional amount for the latter two phrases it could not have found it. In consequence, it is only common sense to suppose that it would have understood these [fol. 107] phrases to be redundent methods of repeating the one measure of damages. The instructions when taken together are not susceptable of the interpretation contended for by the defendants. While they are not letter perfect, we do not believe that there was prejudicial error in this regard.

The next contention is that the lower court committed prejudicial error in giving instructions on abstract principles of law which were outside the issues and the evidence. Objection is made to that portion of Instruction 7 in which the court read to the jury part of the Federal Employers' Liability Act including that part which related to the carriers liability for injuries resulting from "any defect or insufficiency, due to its (the carriers) negligence in its cars, engines, appliances, machinery, track, roadbed, work boats, wharves or other equipment." Admittedly there were no issues or evidence purporting to deal with defects or insufficiencies. It would have been better had this portion of the instruction been omitted. Yet we do not think that this was prejudicial error. A similar objection was made in Kusturin v. Chicago & Alton R. Co., 209 Ill. App. 55, where the court stated:

> "The third instruction given at the appellee's request stated the substance of the entire Federal Employers' Liability Act, including provisions therein not involved in this case. We think the portion objected to might well have been omitted, as said by us in a former case, but still we do not think the jury could have been misled to believe that appellee could recover here for any defect in appellant's track or roadbed."

The defendants contend that the jury may have concluded from this instruction that defendants were charged with negligence in failing to keep their equipment and roadbed in proper condition. It could not so have concluded where there was no evidence even remotely showing any such negligence. Moreover since we have concluded that the evidence shows negligence on the part of the defendants as above demonstrated as a matter of law, we therefore must conclude that there could be no prejudicial error in this regard.

Likewise there was no prejudicial error in instructing the jury on rules of the road even though those rules may have been inapplicable to the issues raised. Such an instruction could have only had the effect of influencing the jury to believe that the defendants were negligent in failing to enforce the rules. Since we have held that the defendants were negligent in other respects as a matter of law, they could not have been prejudiced by this instruction.

The same holds true as to Instruction 11 on the "assumption of risk" doctrine. No such issue was raised by the pleadings or the evidence and no good purpose could have been served by the giving of such an instruction. Yet this could not be prejudicial to the defendants for even if the jury inferred from the giving of such an instruction that the doctrine of "assumption of risk" applied, the defendants could not have been prejudiced. If they had thought that the plaintiff had possibly assumed the risk, it would have been to the defendants' benefit not to their disadvantage or prejudice.

[fol. 108] While Instruction 16, in which the jury was told that the plaintiff was engaged at the time of the accident in interstate commerce and that the case was therefore governed by Federal rather than State law, may have been unnecessary in that the source of the law was not necessarily a concern of the jury, it could in no way prejudice the defendants. The same is true as to Instruction 17 in which the court admonished those jurors who had had previous trial experience in negligence cases to dispel from their minds any and all conceptions that they may have in respect to the law of negligence because this case was governed by Federal law rather than State law.

The next contention is that the court committed prejudicial error by reading the pleadings to the jury in Instruction 1. In Instruction No. 2 the jury was told that they were not to regard the statements made in Instruction No. 1 as statements of facts proven in the case, but were to take them merely as a general and summarized statement of what the respective parties claim to be the facts. The plaintiff contends that the pleadings were not read verbatim but were merely summarized. Upon examination it appears that Instruction 1 so nearly follows the wording of the pleadings that there would have been no substantial difference had the pleadings themselves been read verbatim. If reading the pleadings verbatim would have been prejudicial error we must hold that Instruction No. 1 is subject to the same objection. There is nothing inherently erroneous in reading the pleadings in order to present the issues. If they are concise, well drawn and present the issues sharply where there is evidence material to each issue, it may be that the court could not improve upon them as a method of stating the position of each side.

In Shields v. Utah Light & Traction Co., 99 Utah 307, 105 P. (2d) 347, one of the reasons assigned for reversing a judgment was that the court had read a long and involved pleading to the jury when there was no evidence to support some of the allegations made in the pleadings. One justice concurred outright in this reasoning; two concurred only in the results; and one dissented from the holding that it was prejudicial error. The case, therefore, is not controlling.

In the earlier case of Davis v. Heiner, 54 Utah 428, 181 Pac. 587, by a divided court, we held that merely reading a "verbatim statement of the complaint, answer and reply is not such a statement of the issues as the law contemplates and may be misleading and prejudicial." We also stated:

> "The better practice in all cases is for the trial court to make a plain and concise statement in its own language of the issues to be determined by the jury, carefully omitting any and all issues that have been eliminated by the parties themselves or the court during or before the trial. But it does not necessarily follow that the losing party has been prejudiced simply because the trial court copied in his instructions and read to the jury the pleadings in the case instead of a statement of the issues in the language of the court."

Again in Farmers' and Merchants' Sav. Bank v. Jensen, 64 Utah 609, 232 P. 1084, we affirmed this rule and held that:

> [fol. 109] "The court in the written charge should itself clearly define the particular issue or issues submitted to the jury, and should specifically state to them the material facts alleged, denied, and admitted in respect of such issues. Pulos v. Railroad, 37 Utah 238, 107 P. 241, Ann. Cas. 1912C, 218. But upon appeal prejudice will not be presumed simply from a showing that the trial court failed to construe the pleadings and to charge jury upon the issues. The burden rests upon the complaining party to go further and point out to this court wherein and in what respect he has been prejudiced by such error on the part of the trial court. Davis v. Heiner, 54 Utah 428, 181 P. 587."

While most jurisdictions frown on the practice of using the language of the various pleadings to summarize the issues for the jury, the rule that reading the pleadings may or may not be error seems to meet with general approval. See Holt v. Mundell, 107 Colo. 373, 112 P. (2d) 1039; Balono v. Nafziger, 137 Kan. 513, 21 P. (2d) 896; Rodes v. Lamar, 145 Okl. 223, 292 P. 335; Robinson v. Ebert, 180 Wash. 387, 30 P. (2d) 992.

It has been held prejudicial error to read parts of pleadings relating to issues upon which no evidence has been introduced. Hines v. Gale, 25 Ariz. 65, 213 P. 395. It is argued here that the pleadings read to the jury referred to the two safety rules concerning warning signals and that there was no evidence to show that these rules applied to this situation. However, our holding that even without the rules the plaintiff as a matter of law proved negligence, answers any contention that the defendants were prejudiced by such an instruction.

And last, defendants contend that it was error to admit exhibit G in evidence. This exhibit was compiled by a witness who qualified as an expert. It was compiled from Annuity Tables by McKenzie. The tables themselves would have been admissible in evidence along with Mortality and Annuity Tables. The witness merely, from these tables, compiled various figures to show what amount of money it would be necessary to invest at various interest rates at the present time to pay to an individual $1200.00 per year, $1800.00 per year, and $2400.00 per year for thirty-five years. Since the various tables from which the witness took his data would have been admitted in evidence, we see no objection in having this witness prepare computations from these tables by way of summary. There is no contention that these figures so prepared were inaccurate or that the witness who prepared and explained them was not competent to do so.

There is no prejudicial error in the lower court's proceedings. Judgment affirmed. Costs to respondent.

McDonough, Justice, and Wade, Justice, concur.

SEPARATE OPINION

LARSON, Justice (concurring in part, dissenting in part):

I concur in that part of the opinion holding that under the evidence, defendants were guilty of negligence which proximately contributed to the accident.

I dissent from that part of the opinion holding that as a matter of law plaintiff was not guilty of contributory negligence. As I read the evidence and the authorities, the question of contributory negligence on the part of plaintiff was a question for the jury. At this point we note some interesting facts in connection with the court's in-
[fol. 110] structions to the jury. In Instruction number 6, the court told the jury that none of the things plaintiff did could constitute negligence, which has the effect of saying that the question of plaintiff's contributory negligence was not to be considered by the jury. I think this instruction was error.

But after so instructing, the court gave instruction No. 15, wherein he told the jury that if plaintiff was guilty of contributory negligence it must reduce the amount awarded plaintiff in proportion to the amount of negligence of the plaintiff. This was clearly not in harmony with Instruction 6 and one or the other should not have been given. But furthermore, with Instruction 15 given, it would be incumbent upon the court to define contributory negligence to the jury. The judgment roll discloses that defendants submitted to the court a requested instruction properly defining contributory negligence. This requested instruction appears in the file, endorsed by the judge as "Given", but it is not found in form or substance in the charge as read to the jury. No exception to the failure of the court to give this Request No. 5 was taken, perhaps because when the court endorsed the request as "given", counsel assumed the court had given it. Clearly when Instruction 15 was given, defendants' Request No. 5 should have been given to enable the jury to apply Instruction No. 15 intelligently.

Plaintiff argues that in fact the question of contributory negligence was submitted to the jury by Instruction 15, which in effect told the jury to reduce any award in proportion to plaintiff's negligence, if he was contributorily negligent. But since the court did not define contributory negligence, and told the jury in Instruction 6 that plaintiff

was not negligent in anything he did, or did not do, such argument fails. For the reason given I think the judgment should be reversed.

MOFFATT, Justice:

I dissent. I think the evidence does not establish negligence as a matter of law.

IN THE SUPREME COURT OF UTAH

JUDGMENT—October 25, 1943

This cause having been heretofore argued and submitted and the court being sufficiently advised in the premises, It Is Now Ordered, Adjudged and Decreed, that the judgment of the District Court herein be, and the same is, affirmed. Costs to respondent.

IN THE SUPREME COURT OF UTAH

ORDER DENYING REHEARING—December 27, 1943

On consideration of the Petition for Rehearing heretofore filed herein, and of the arguments of Counsel thereupon had, It Is Ordered that rehearing be, and the same is, denied.

[fol. 111] IN DISTRICT COURT OF SALT LAKE COUNTY

INSTRUCTION No. 15

You are instructed that contributory negligence of the plaintiff, if you find that he was contributorily negligent, would not of itself constitute a defense to the negligence of the defendants, if you find that they were negligent. Such contributory negligence, however, does operate to reduce the amount which the plaintiff would be entitled to recover, if you find that he is entitled to recover anything. If, under the instructions given you, you find that the defendants were negligent and that such negligence was a proximate cause of the injury sustained by the plaintiff, and that the plaintiff was also guilty of negligence which proximately

caused or contributed to his injuries, then and in such circumstances it would be your duty to reduce the amount which the plaintiff would otherwise be entitled to recover in proportion to the amount of negligence of the plaintiff.

DEFENDANTS' REQUEST FOR INSTRUCTION No. 5

You are instructed that contributory negligence is the failure of a person to exercise reasonable care under the circumstances for his own safety and to avoid injury to himself. In this connection you are instructed that it was the duty of the plaintiff in carrying out his work to obey the instructions of the hostler and to adopt reasonably safe methods of doing the work. If you believe from the evidence that the plaintiff failed to follow the instructions of his hostler or that he adopted an unsafe and unnecessarily dangerous method of doing the work that he was instructed to do and that such disobedience or failure was a proximate cause of the injuries which he sustained, then you should find that he was guilty of contributory negligence.

Given Geo. A. Faust Judge.

[fol. 112] The record on appeal from the Third Judicial District Court to the Supreme Court of Utah does not include in the instructions to the jury defendants' requested Instruction No. 5, or any instruction numbered 5, and does not include any exception by defendants to any failure of the trial court to give defendants' requested Instruction No. 5. Other requests for Instructions not given by the trial court were endorsed: "Refused Geo. A. Faust, Judge."

[fol. 113] [File endorsement omitted]

IN THE SUPREME COURT OF UTAH

[Title omitted]

PRAECIPE FOR RECORD—Filed February 21, 1944

To the Clerk of the Above Entitled Court:

Wilson McCarthy and Henry Swan, Trustees of the Denver and Rio Grande Western Railroad Company, and the Denver and Rio Grande Western Railroad Company hereby

designate and request you to transcribe and certify the following material portions of the record to be incorporated into the Transcript of Record to be transmitted to the Supreme Court of the United States to accompany the petition for a Writ of Certiorari in said cause to be filed in said court by said defendants and appellants herein. (References to "Tr." are to pages in the Transcript of Record from the Third Judicial District Court to the Supreme Court of the State of Utah.):

1. Complaint filed February 16, 1942, omitting therefrom subparagraph "F" of Paragraph 5, which was stricken by the District Court.

2. Answer of defendant the Denver and Rio Grande Western Railroad Company filed April 30, 1942.

3. Answer of defendant Trustees filed April 30, 1942.

4. The three forms of verdicts submitted to the jury filed June 6, 1942. (Tr. 28, 29 and 30)

[fol. 114] 5. Entered order showing Motion for Directed Verdict, denial thereof, submission of case to jury and verdict dated June 7, 1942 (Tr. 31).

6. Instruction to Jury No. 6 (Tr. 324-325).

7. Exceptions to Instruction to Jury No. 6 (Tr. 339).

8. Instruction to Jury No. 9 (Tr. 327-328).

9. Exceptions to Instruction to Jury No. 9 (Tr. 340).

10. Instruction to Jury No. 20 (Tr. 334-335).

11. Exceptions to Instruction to Jury No. 20 (Tr. 342).

12. Judgment on Verdict (Tr. 64).

13. Notice and Motion for New Trial (Tr. 93-94).

14. Notice of Overruling of Motion for New Trial (Tr. 100).

15. Notice of Appeal filed October 2, 1942 (Tr. 106).

16. Certificate of Clerk of Third Judicial District Court in and for Salt Lake County certifying record on appeal to the Supreme Court of Utah (Tr. 107).

17. The following portions of the Bill of Exceptions:

R. 109;
R. 112 to R. 160, line 11, but omitting
lines 11 to 15, R. 112,
line 27, R. 114, to line 3, R. 115,
line 5, R. 115 to line 12, R. 115,
lines 13 to 20, R. 121,
lines 6 to 12, R. 122,
lines 19 to 21, R. 125,
line 24, R. 127,
lines 27 and 28, R. 127,
all of R. 128,
lines 1 to 8, R. 129,
lines 14 to 19, R. 129,
lines 1 to 3, R. 134,
lines 22 to 27, R. 134,
lines 1 and 2, R. 135,
lines 7 and 8, R. 141,
lines 20 to 26, R. 141,
line 11, R. 150,
lines 18 to 20, R. 150,
lines 24 to 28, R. 151,
line 23, R. 152,
line 8 to end of page, R. 153,
all of R. 154,
lines 1 to 23, R. 155,
lines 4 to 7, R. 157,
line 12 to end of page, R. 157,
[fol. 115] lines 1 and 2, R. 158,
lines 26 and 27, R. 158,
lines 1 to 11, R. 159,
lines 24 and 25, R. 159,
R. 181, line 20, to R. 226, line 26, but omitting
lines 22 to end of page, R. 182,
lines 1 to 22, R. 183,
lines 9 to 12, R. 184,
lines 3 and 4, R. 195,
lines 13 to end of page, R. 205,
lines 1 to 5, R. 206,
lines 4 to 6, R. 212,
lines 18 to end of page, R. 212,
lines 1 to 3, R. 213,
lines 17 and 18, R. 219,

lines 14 to 28, R. 221,
lines 9 to 17, R. 222,
lines 16 to 19, R. 223,
lines 7 to 14, R. 225,
lines 19 to end of page, R. 225,
lines 6 to 22, R. 226,
R. 233, line 26 to R. 234, line 24.
R. 260, line 3 to R. 296, but omitting:
lines 2 to 11, R. 262,
lines 13 to 17, R. 267,
lines 12 to end of page, R. 270,
lines 1 to 16, R. 271,
lines 16 to 22, R. 277,
lines 6 to 17, R. 293,
lines 26 to end of page, R. 293,
lines 1 to 9, R. 294,
lines 18 to end of page, R. 294,
lines 1 to 16, R. 295.
Exhibits: A, B, E, F,
1, 2, 3, 4, 5.

Order Settling Bill of Exceptions (Tr. 351-352).

18. Opinion of Supreme Court of Utah.

19. Judgment of Supreme Court of Utah.

20. Order of Supreme Court of Utah denying Petition for Rehearing.

At the suggestion of the respondent, appellants further request you to transcribe and certify the following portions of the record:

21. Instruction to Jury No. 15 (Tr. 331-332).

[fols. 116-120] 22. Defendants' request for Instruction No. 5 including the endorsement appearing thereon "Given Geo. A. Faust, Judge", (Tr. 88), and together with the following statement:

"The record on appeal from the Third Judicial District Court to the Supreme Court of Utah does not include in the instructions to the jury defendants' requested instruction No. 5, or any instruction numbered 5, and does not include any exception by defend-

ants to any failure of the trial court to give defendants' requested Instruction No. 5. Other requests for Instructions not given by the trial court were endorsed: 'Refused Geo. A. Faust, Judge.' "

The portions of the record designated herein are intended to constitute the record in the Supreme Court of the United States upon Petition for Writ of Certiorari to be filed by said Defendants and Appellants and for review upon said Writ of Certiorari, if granted. Said portions of the record are all of the material portions thereof necessary to a proper presentation and consideration in the Supreme Court of the United States of the questions presented by the Petition for Certiorari.

Said transcript is to be prepared as required by law and the rules of this court and the rules of the United States Supreme Court concerning Writs of Certiorari and to be immediately filed in the office of the Clerk of the Supreme Court of the United States in Washington, D. C.

Dated this 21st day of February, 1944.

P. T. Farnsworth, Jr., W. Q. Van Cott, Attorneys for defendants and appellants.

Received copy of the foregoing Praecipe together with copy of petition for Writ of Certiorari, this 21st day of February, 1944.

Rawlings, Wallace & Black, C. W. Rawlings, Attorneys for plaintiff and respondent.

[fol. 121] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 122] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 1, 1944

The petition herein for a writ of certiorari to the Supreme Court of the State of Utah is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3283)

[fol. 123] STIPULATION AND ADDITION TO RECORD

Defendants' Request for Instruction No. 6

You are instructed that contributory negligence of the plaintiff, if you find that he was contributorily negligent, would not of itself constitute a defense to the negligence of the defendants, if you find that they were negligent. Such contributory negligence, however, does operate to reduce the amount which the plaintiff would be entitled to recover, if you find that he is entitled to recover anything. If, under the instructions given you, you find that the defendants were negligent and that such negligence was a proximate cause of the injury sustained by the plaintiff and that the plaintiff was also guilty of negligence which proximately caused or contributed to his injuries, then and in such circumstances it would be your duty to reduce the amount which the plaintiff would otherwise be entitled to recover in proportion to the amount of negligence of the plaintiff.

[fol. 124] (Instructions of the Court read to the jury, as follows:)

No. 2. You are instructed that the statements made to you in Instruction No. 1 are not to be regarded by you as a statement of the facts proven in this case, but are to be taken by you merely as a general and summarized statement of what the respective parties claim to be the facts. Where it is stated in these instructions and in the taking of evidence that a fact claimed by one party is admitted by another, you are to consider such fact so claimed and so admitted as an established fact in the case. Beyond this you are not to draw any conclusions concerning the facts from a mere recital by the Court of the claims of the respective parties.

No. 3. You are instructed that negligence is the failure to do what a reasonably prudent person would ordinarily have done under the circumstances of the situation, or having done that which such a person under such existing circumstances would not have done. The fault may lie in acting or omitting to act. The duty is dictated and measured by the exigencies of the occasion.

The law does not require one to be extraordinarily alert so as to see all that can be seen by looking backward after

the accident has happened, or to have extraordinary caution to do, in avoidance of the injury, all that can be seen in retrospect that it might have been possible to have done. If one observed the degree of care that would ordinarily be observed by an ordinarily prudent and careful person surrounded by similar circumstances, he has fully discharged the duty which the law imposes upon him.

No. 4. If you find from a preponderance of all the evidence in the case that the defendant was guilty of any one or more of the acts or omissions alleged in plaintiff's complaint as negligence, that such acts or omissions, or any of them, constitute negligence as that term has been defined for you, and that such acts or omissions, or any of them, proximately caused the accident and resulting injuries complained of, then you should find for the plaintiff and award him such damages as in these instructions set forth.

On the other hand, if you do not find by a preponderance of all of the evidence in the case that the defendant was guilty of any one or more of said acts or omissions, and that the same were negligent, and that they proximately caused the accident and resulting injuries, then your verdict should [fol. 125] be against the plaintiff and in favor of the defendant.

Instruction No. 7

It is admitted in the pleadings that at the time and place of the alleged injury to plaintiff, both the plaintiff and defendant were engaged in interstate commerce. In this connection, a portion of the Federal Employers' Liability Act in effect at the time of this accident, reads as follows:

"Every common carrier by railroad while engaged in commerce between any of the several States or Territories, or between any of the States or Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery,

track, road-bed, works, boats, wharves or other equipment."

Instruction No. 8

If any allegations of the complaint herein are admitted as true by the answer of the defendant, then in your deliberations you must proceed upon the theory that such allegations of such complaint for all purposes in the case are true.

You are instructed that it is alleged in the complaint and admitted in the answer:

(a) That prior to the 1st day of December, 1941, the defendants had adopted, promulgated and published the following rule and regulation pertaining to the Operating Department of defendant:

"The bell must be rung when an engine is about to move and while approaching and passing stations, tunnels, snowsheds and public crossing at grade."

(b) That prior to the 1st day of December, 1941, the defendants had adopted, promulgated and published a certain safety rule which provided as follows:

"Engine bell or whistle warning must be given before [fol. 126] engines are moved, then wait at least one minute."

You are instructed that under the evidence in this case, one Colosimo, who was then and there an employee of the defendant, was in charge and control of Engines 1149 and 1182 at the time of the accident wherein plaintiff was injured, and in determining whether or not the defendants were negligent towards plaintiff, as in these instructions defined, you may determine from the evidence whether or not these rules were violated, and if you shall find and believe, from a preponderance of the evidence, that said rules were violated by said Colosimo, then you may consider this fact in determining whether or not the defendant, at the time and place alleged in the complaint, was negligent (as that term has been defined herein) toward plaintiff, and if you shall find and believe, from a preponderance of the evidence, that defendant was negligent, and that said negligence was the proximate cause of plaintiff's injuries.

Instruction No. 10

You are instructed that it is the duty of the employees of a railroad company to obey all rules which such company has established and which are in force for the operation of its trains and engines and for the protection and safety of its employees and that the violation of such rules by an employee of a railroad company directly and proximately causing injury to another employee is actionable negligence.

Instruction No. 11

A portion of the Federal Employers' Liability Act, under which this action has been instituted, in effect at the time of this accident, reads as follows:

"In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier."

Instruction No. 12

You are instructed that if you shall find from a preponderance of the evidence that plaintiff was acting in the performance of his duty as a hostler's helper immediately prior to his injury and that the hostler, Colosimo, was then and there duty bound not to put the engines in motion until he [fol. 127] had received a signal to do so from plaintiff, or until he had given proper warning of his intention to do so, and that said hostler in violation of such duty did place said engines in motion without having received from plaintiff any signal whatsoever, and without having given any warning of his intention to move said engines by bell, whistle or otherwise; and that said movement was unknown to plaintiff and unexpected by him, and that said movement proximately caused plaintiff to lost his balance and fall upon the rail in front of the moving wheels of the tender of Engine 1182, causing injury to him, your verdict must be for the plaintiff and against the defendant.

Instruction No. 13

Some of the witnesses who have testified in this case have testified as experts, and the opinions given by such experts are referred to as expert testimony. In this connection you are instructed that you are not required to accept as true the opinion of any expert who has testified in the case. You are at liberty to reject all or any part of such testimony whenever you believe it is not supported by the evidence in the case, or is contrary to what you believe the facts to be. You are the sole judges of the facts and the credibility of the witnesses. You will give such weight to any evidence in the case as you think it is entitled to, regardless of the opinion of any expert who may have testified.

Instruction No. 14

You are instructed that a hostler in the regular employ of the defendants, while on duty is vice principal of said defendants; and if you find from a preponderance of the evidence that Charles Colosimo on the morning of December 1, 1941, at the time of the injury to plaintiff, was a hostler in the regular employ of the defendants and in charge of Engines 1149 and 1182, and that said Colosimo then and there operated said engines in a negligent manner, then the negligence of said Charles Colosimo is chargeable to the defendants the same as if his acts were the acts of the defendants.

Instruction No. 14-A

You are instructed that the Federal Employers' Liability Act, heretofore mentioned by the Court, in effect at the time of this accident, provided as follows:

"In all actions hereafter brought against any such com-
[fol. 128] mon carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of the negligence attributable to such employee.

Instruction No. 16

Plaintiff being engaged at the time and place of the accident referred to in the complaint, in the conduct of interstate commerce, the statutes of the State of Utah governing Employers Liability and Workmen's Compensation are not applicable to this case, and plaintiff's right to recover is based on the statutes of the United States covering the liability of common carriers by railroad to their employees for injuries sustained while in the course of their employment.

Instruction No. 17

I charge those members of the jury who have had previous experience as trial jurors in negligence cases arising under state laws, to dispel from their minds any and all conceptions that they may have with respect to the law of negligence as gained from the instructions of the Court in those cases, because in some respects the state and national laws conflict, and in actions under the Federal Acts, which proceed under national instead of state authority, you are bound to follow the instructions as now given to you by the Court which proceeds upon national, as distinguished from state, authority.

Instruction No. 18

You are instructed that it is your sworn and solemn duty to hear and determine this case precisely the same as if it were between two individuals. The mere fact that the plaintiff is an individual and that the defendant is a corporation should make no difference whatever to you.

In determining the questions of fact you are not at liberty to indulge in conjectures not based on evidence introduced in this case; nor are you at liberty to follow your own ideas of what the law is or ought to be. On the contrary, you should look solely to the evidence for the facts, and to the instructions given you by the Court for the law, and return a verdict according to the facts established by [fol. 129] the evidence, and the law as laid down by the Court, without reference to the individual or private character of the plaintiff, or to the corporate character of the defendant.

You should require as much evidence to find an issue against a corporation as you would against an individual,

and likewise, you should require as much evidence to find an issue against an individual as you would against a corporation. A corporation and an individual are entitled to the same protection of the law.

Sympathetic feelings have no place whatever in the trial of a case in a court of justice. You should disregard all such influence and determine the case at bar according to the law and the evidence given you in open court, regardless of who the parties are, and with fairness, justice and impartiality.

Instruction No. 19

If you find from the evidence that the plaintiff is entitled to a verdict, you must not, in ascertaining the amount, resort to the pooling plan or scheme which has sometimes been adopted by juries for fixing such amount. That plan or scheme is where each juror writes the amount to which he considered the plaintiff is entitled, and the amounts so written are added together, and the total is divided by eight. This is a scheme of chance and no element of chance may enter into your verdict or into the determination of any question necessary thereto.

[fol. 130] Exceptions

Mr. Bagley: Come now the defendants, and each of them, and separately except to the instructions to the jury, and the whole thereof.

Defendants except to Instruction No. 1, and the whole thereof.

Defendants separately except to that part of Instruction No. 1, beginning on page numbered 5, with the paragraph commencing:

"That Charles Colosimo violated this rule by suddenly and unexpectedly starting the engine, thereby causing the plaintiff to lose his balance and to be thrown from the rear end of engine No. 1182 and on to the track immediately in front of the wheels of said engine."

Defendants except to paragraph numbered "(e)" of Instruction No. 1.

Defendants except to Instruction No. 3, and the whole thereof.

Defendants except to Instruction No. 4, and the whole thereof.

Defendants except to that part of Instruction No. 4 which reads as follows:

"If you find from a preponderance of all the evidence in the case that the defendant was guilty of any one or more of the acts or omissions alleged in plaintiff's complaint as negligence, that such acts or omissions, or any of them, constitute negligence as that term has been defined for you, and that such acts or omissions, or any of them, proximately caused the accident and resulting injuries complained of, then you should find for the plaintiff and award him such damages as in these instructions set forth."

Defendants except to the second paragraph of instruction numbered 4, and to the whole of said paragraph.

Defendants except to Instruction No. 6, and the whole thereof.

The defendants except to the first paragraph of Instruction No. 6 and to the whole of said paragraph.

Defendants except to the second paragraph of said Instruction No. 6, and to the whole of said paragraph.

Defendants except to the third paragraph of Instruction No. 6, and to the whole of said paragraph.

Defendants except to Instruction No. 7 and to the whole thereof.

Defendants except to all that part of Instruction No. 7, [fol. 131] following the first sentence of said instruction.

Defendants except to that part of Instruction No. 7 which reads as follows:

"Or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

Defendants except to Instruction No. 8, and the whole thereof.

Defendants except to that part of Instruction No. 8 which is contained in the first paragraph thereof.

Defendants except to that part of Instruction No. 8 commencing with the word "You", in the second paragraph, and ending with the word "grade".

Defendants except to that part of Instruction No. 8, contained in the paragraph marked "(b)".

Defendants except to that part of Instruction No. 8, commencing with the word "You" in the last paragraph, and ending with the word "injuries".

Defendants except to Instruction No. 9, and the whole thereof.

Defendants except to the first paragraph of Instruction No. 9.

Defendants except to that part of Instruction No. 9, which reads: "could make in this locality."

Defendants except to the second paragraph of Instruction No. 9, and to the whole thereof.

Defendants except to Instruction No. 10 and to the whole thereof.

Defendants except to Instruction No. 11, and to the whole thereof.

Defendants except to Instruction No. 12, and to the whole thereof.

Defendants except to that part of Instruction No. 12 which reads as follows: "Was then and there duty bound not to put the engines in motion until he had received a signal to do so from plaintiff".

Defendants except to that part of Instruction No. 12 which reads as follows: "or until he had given proper warning of his intention to do so."

Defendants except to that part of Instruction No. 12 which reads as follows: "and that said hostler in violation of such duty, did place said engines in motion without having received from plaintiff any signal whatsoever, and without having given any warning of his intention to move said engines, by bell, whistle or otherwise."

Defendants except to that part of Instruction No. 12, which reads as follows: "And that said movement was unknown to palintiff and unexpected by him."

[fol. 132] Defendants except to that part of Instruction No. 12 which reads as follows: "and that said movement proximately caused plaintiff to lose his balance and fall upon the rail in front of the moving wheels of the tender of Engine 1182, causing injury to him, your verdict must be for the plaintiff and against the defendant."

Defendants except to Instruction No. 14, and to the whole thereof.

Defendants except to Instruction No. 14-A, and to the whole thereof.

Defendants except to Instruction No. 16, and to the whole thereof.

Defendants except to that part of Instruction No. 16, which reads as follows:

"Plaintiff being engaged, at the time and place of the accident referred to in the complaint, in the conduct of interstate commerce, the statutes of the State of Utah governing Employers' Liability and Workmen's Compensation are not applicable to this case."

Defendants except to Instruction No. 17, and to the whole thereof.

Defendants except to Instruction No. 19, and to the whole thereof.

Defendants except to that part of Instruction No. 19 contained in the first sentence thereof.

Defendants except to that part of Instruction No. 19 which is contained in the second sentence thereof.

Defendants except to Instruction No. 20, and to the whole thereof.

Defendants except to that part of Instruction No. 20 which is contained in the first sentence thereof.

Defendants except to that part of Instruction No. 20 which is contained in the second paragraph thereof.

Defendants except to that part of Instruction No. 20 which is contained in the last paragraph thereof.

Defendants except to the refusal of the Court to give their request for Instruction No. 2.

Defendants except to the refusal of the Court to give their request for Instruction No. 3.

Defendants except to the refusal of the Court to give their request for Instruction No. 1.

[fol. 133] "Defendants made requests for instructions to the jury numbered from 1 to 6, inclusive; that the record shows Requests No. 1 was marked, 'Refused, Geo. A. Faust, Judge,' that Request No. 2 was marked, 'Refused, Geo. A. Faust, Judge,' that Request No. 3 was marked, 'Refused, Geo. A. Faust, Judge,' that Request No. 4 was marked, 'Given, Geo. A. Faust, Judge,' that Request No. 5 was marked, 'Given, Geo. A. Faust, Judge,' and that Request No. 6 was marked, 'Given, Geo. A. Faust, Judge.' "

[fol. 134] Statement of Errors Relied on

Appellant relies on the following errors for reversal of the judgment of the court below:

1. The court erred in instructing the jury in the first sentence of Instruction No. 6 (R. 324, 325) that plaintiff had a right to assume that the hostler Colosimo would use ordinary care to prevent injury to him, would not put the engines in motion without first receiving from plaintiff a signal to do so, and would not move the engines without giving plaintiff warning by bell or whistle of his intention so to do, to which sentence of instruction No. 6 (as well as the entire instruction) appellant duly excepted. (R. 339.) This error is discussed in Section I of the brief.

2. The court erred in instructing the jury in the second sentence of Instruction No. 6 (R. 325) that plaintiff had a right to presume that Colosimo would act in a prudent, proper and careful manner and that Colosimo would obey and not violate any of the rules and regulations of the railroad company pertaining to the movement of its trains and engines and the safety of its employes in force at the time, to which sentence of instruction No. 6 (as well as the entire instruction) appellant duly excepted. (R. 339.) This error is discussed in Section I of the brief.

3. The court erred in instructing the jury in the third sentence of Instruction No. 6 (R. 325) that plaintiff had a right to act upon the presumption that Colosimo would do his duty and would exercise due care, (R. 325) to which sentence of Instruction No. 6 (as well as the entire instruction) appellant duly excepted. (R. 339.) This error is discussed in Section I of the brief.

4. The court erred in instructing the jury in Instruction No. 20 (R. 334) that the jury in estimating the amount of damages might consider the loss of wages and future earnings and impairment of earning capacity and determine from all these elements the sum that will fairly compensate plaintiff, to which instruction appellant duly excepted. (R. 342.) This error is dicussed in Section II of the brief.

5. The court erred in instructing the jury in Instruction No. 9 (R. 327) that in considering the element of loss of wages and earnings it should ascertain and determine the [fol. 135] loss or impairment of plaintiff's earning power

resulting from the injury, to which instruction appellant duly excepted. (R. 340.) This error is discussed in Section II of the brief.

6. The court erred in instructing the jury in Instruction No. 9 (R. 327) that plaintiff would be entitled to receive as compensation for loss and impairment of future earning power the value or equivalent of said loss and impairment of earning power, to which instruction appellant duly excepted. (R. 340.) This error is discussed in Section II of the brief.

7. The court erred in giving to the jury Instructions Nos. 9 and 20 (R. 327, 334) with respect to the measure of damages without instructing the jury that damages should be diminished on account of contributory negligence, if found to exist, to which instructions appellant duly excepted. (R. 340, 342.) This error is discussed in Section II of the brief.

8. The court erred in instructing the jury in Instruction No. 7 (R. 218) that the Federal Employers' Liability Act provided that railroads are liable for damages to any person employed by such railroad for injury resulting in whole or in part by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed or other equipment, to which instruction appellant duly excepted. (R. 339.) This error is discussed in Section III of the brief.

9. The court erred in instructing the jury in Instruction No. 10 (R. 328) that it is the duty of all employes of a railroad company to obey all rules which said company establishes for the operation of its trains and engines and for the protection and safety of its employes and that the violation of such rules by an employe of the railroad company directly and proximately causing injury to any employe is actionable negligence, to which instruction appellant duly excepted. (R. 340.) This error is discussed in Section III of the brief.

10. The court erred in instructing the jury in Instruction No. 11 (R. 329) that the Federal Employers' Liability Act provides that an employe shall not be held to have assumed the risk of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents or employes of the carrier, to which instruction appellant duly excepted. (R. 340.) This [fol. 136] error is discussed in Section III of the brief.

11. The court erred in instructing the jury in Instruction No. 16 (R. 332) that the statutes of the State of Utah covering employers liability and workmen's compensation are inapplicable to the case, to which instruction appellant duly excepted. (R. 341.) This error is discussed in Section IV of the brief.

12. The court erred in instructing the jury in Instruction No. 17 (R. 332) that they should dispel from their minds all conceptions with respect to the law of negligence as gained from courts' instructions in other cases, to which instruction appellant duly excepted. (R. 342.) This error is discussed in Section IV of the brief.

13. The court erred in reading the pleadings to the jury in Instruction No. 1 (R. 315-322) and leaving to the jury the task of ascertaining from the pleadings what the issues were, to which appellant duly excepted. (R. 338.) This error is discussed in Section V of the brief.

14. The court erred in admitting in evidence Exhibit G setting forth the evidence of the witness Willard G. Smith, who was personally present and testified at the trial (R. 255) over the objection of defendants. (R. 255.) This error is discussed in Section VI of the brief.

[fol. 137] PETITION FOR REHEARING

Come now Wilson McCarthy and Henry Swan as Trustees of the property of the Denver and Rio Grande Western Railroad Company and The Denver and Rio Grande Western Railroad Company, a corporation, appellants herein, and respectfully petition this Honorable Court for a rehearing in the above entitled case and to vacate the order of this court herein affirming the judgment against appellants.

This petition is based on the following grounds:

I

THE MAJORITY OPINION ERRS IN HOLDING AS MATTER OF LAW THAT PLAINTIFF WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

II

THE MAJORITY OPINION ERRS IN HOLDING THAT DEFENDANTS WERE GUILTY OF NEGLIGENCE AS MATTER OF LAW.

III

THE COURT ERRS IN CONCLUDING THAT INSTRUCTIONS NO. 9 AND NO. 20, ALTHOUGH REPETITIOUS AND REDUNDANT, WERE NON-PREJUDICIAL.

Accompanying this petition and filed herewith is a brief in support thereof.

Farnsworth & Van Cott, Grant H. Bagley, E. C. Jensen, Attorneys for Appellants.

Each of the undersigned hereby certifies that he is one of the attorneys for appellants, petitioners herein, and that in his opinion there is good cause to believe the judgment objected to is erroneous and that the cause ought to be re-examined as prayed for in said petition.

Dated November 15, 1943.

W. Q. Van Cott, Grant H. Bagley.

Received copy of the foregoing petition and brief in support thereof November 15, 1943.

Rawlings, Wallace & Black, Attorneys for Respondent.

[fol. 138] Respondent's opening brief in this court contains the following statements:

"There is a complete absence of testimony in the record of any negligence whatsoever on the part of respondent. (P. 18.)

"We have heretofore pointed out that there is no evidence in the record which would justify a finding of contributory negligence on the part of respondent. (P. 24.)

"In the absence of evidence of contributory negligence, all cases hold that it is proper to instruct the jury that plaintiff is entitled to assume that defendant will not be negligent. (P. 25.)

"As we have heretofore pointed out, there is no evidence of contributory negligence in the record. Assuming that instruction given did in fact negative the defense of contributory negligence in the absence of evidence of contributory negligence, it was properly given. (P. 31-32.)

"In the case at bar, the Court instructed the jury that contributory negligence on the part of plaintiff would oper-

ate to diminish the amount of his recovery. This was covered by instruction 14a (R. 331) and instruction 15 (R. 331, 332.)

"The jury was instructed that contributory negligence would operate to diminish the damage to be recovered by respondent in proportion to the amount of negligence attributable to him. Instruction No. 6 did not negative the duty of respondent to use due care for his own safety but correctly stated that he was entitled to assume that appellants' rules would be obeyed." (P. 34.)

[fol. 139] IN THE SUPREME COURT OF THE STATE OF UTAH

E. E. BRUNER, Respondent,

vs.

WILSON McCARTHY and HENRY SWAN, Trustees of the DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, a Corporation, and the Denver & Rio Grande Western Railroad Company, a corporation, Appellants.

STIPULATION FOR ADDITIONAL RECORD

It is hereby stipulated by and between the above named parties that the Clerk of the Supreme Court of Utah shall transcribe and certify the following additional portions of the record to be incorporated into the transcript of the record heretofore transmitted to the Supreme Court of the United States and filed on March 18, 1944 with the Clerk of the Supreme Court of the United States in Case No. 803, October Term, 1943.

No. 23. Defendants' Request for Instruction No. 6.

24. The court's entire charge to the jury (Tr. 315-337) except Instruction No. 1 (which was a recital of the allegations of the complaint and the admissions, denials and allegations of the answers of the defendants), Instruction No. 6 (which is already in the record and is set forth on pages 10 and 11 of the printed transcript of the record), Instruction No. 9 (which is already in the record and is set forth on pages 11 and 12 of the printed transcript of the record), Instruction No. 15 (which is already in the record and is set forth on pages 117-118 of the printed transcript of the record) and Instruction No. 20 (which is already in the record and is set forth on page 12 of the printed transcript of the record).

25. Transcript of Defendants' Exceptions to the Instructions to the Jury. (Tr. 338-342)

26. The following statement: "Defendants made requests for instructions to the jury numbered from 1 to 6, inclusive; that the record shows Request No. 1 was marked, 'Refused, Geo. A. Faust, Judge,' that Request No. 2 was marked, 'Refused, Geo. A. Faust, Judge,' that Request No. 3 was marked, 'Refused, Geo. A. Faust, Judge,' that Request No. 4 was marked, 'Given, Geo. A. Faust, Judge,' that Request No. 5 was marked, 'Given, Geo. A. Faust, Judge,' and that Request No. 6 was marked, 'Given, Geo. A. Faust, Judge.'"

[fol. 140] 27. Statement of Errors Relied on set forth on pages 6 to 9 of appellants' opening brief in the Supreme Court of Utah.

28. Appellants' petition for Rehearing (but not the brief in support thereof).

29. The following statement: "Respondent's opening brief in this court contains the following statements:

> There is a complete absence of testimony in the record of any negligence whatsover on the part of respondent. (P. 18)
>
> We have heretofore pointed out that there is no evidence in the record which would justify a finding of contributory negligence on the part of respondent. (P. 24)
>
> In the absence of evidence of contributory negligence, all cases hold that it is proper to instruct the jury that plaintiff is entitled to assume that defendant will not be negligent. (P. 25)
>
> As we have heretofore pointed out, there is no evidence of contributory negligence in the record. Assuming that instruction given did in fact negative the defense of contributory negligence in the absence of evidence of contributory negligence, it was properly given. (P. 31-32)
>
> In the case at bar, the Court instructed the jury that contributory negligence on the part of plaintiff would operate to diminish the amount of his recovery. This was covered by instruction 14a (R. 331) and instruction 15 (R. 331, 332).

The jury was instructed that contributory negligence would operate to diminish the damage to be recovered by respondent in proportion to the amount of negligence attributable to him. Instruction No. 6 did not negative the duty of respondent to use due care for his own safety but correctly stated that he was entitled to assume that appellants' rules would be obeyed. (P. 34)"

30. Copy of this stipulation.

Dated August 1, 1944.

(Signed) P. T. Farnsworth, Jr., W. Q. Van Cott, Attorneys for Appellants. Rawling, Wallace & Black, Attorneys for Respondent.

[fol. 141] IN THE SUPREME COURT OF THE STATE OF UTAH

No. 6566

E. E. BRUNER, Respondent,

vs.

WILSON McCARTHY and HENRY SWAN, Trustees of the DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, and the Denver & Rio Grande Western Railroad Company, Appellants

UNITED STATES OF AMERICA:

STATE OF UTAH,
County of Salt Lake, ss:

I, L. M. Cummings, Clerk of the Supreme Court of the State of Utah, do hereby certify that the foregoing pages numbered 001 to 018 contain a full, true, correct and complete transcript of the record, papers and proceedings designated in the Stipulation for Additional Record in the above entitled cause in said court, as full, true, correct and complete as the originals thereof now remain of record and on file in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Court at Salt Lake City, Utah, this 3rd day of August, 1944.

L. M. Cummings, Clerk, Supreme Court of Utah.
(Seal.)

FILE COPY

FILED
MAR 18 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. [redacted] 41

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION, AND THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION,

Petitioners,

vs.

E. E. BRUNER.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF.

/s/ P. T. FARNSWORTH, JR.,
W. Q. VAN COTT,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 803

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION, AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION,

Petitioners,

vs.

E. E. BRUNER.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Wilson McCarthy and Henry Swan, Trustees of The Denver and Rio Grande Western Railroad Company, and The Denver and Rio Grande Western Railroad Company respectfully shows:

Summary and Short Statement of Matter Involved.

The Supreme Court of Utah, by a divided opinion, in a case arising under the Federal Employers Liability Act,

has held as matter of law that plaintiff and respondent, E. E. Bruner (hereinafter called "Bruner") was not guilty of contributory negligence and that defendants and petitioners (hereinafter called the "Railroad") were guilty of negligence, which was a proximate cause of the accident.

The Railroad contends that the evidence and tendencies of the proof were conflicting and such that the issues of negligence on the part of the Railroad and contributory negligence on the part of Bruner should not have been decided as matter of law and that to to do so violated the principles of law announced by this Court in *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 446, 63 S. Ct. 444; *Bailey* v. *Central Vermont Ry. Inc.*, 319 U. S. 350, 87 L. Ed. 1030, 63 S. Ct. 1062; *Owens* v. *Union Pacific R. Co.*, 319 U. S. 715, 87 L. Ed. 1221, 63 S. Ct. 1271, and *Brady* v. *Southern Railway Co.*, No. 26, Oct. Term, 1943, decided December 20, 1943, 64 S. Ct. 232. In those cases this Court held that questions should not be decided as matter of law where the evidence and tendencies of the proof are conflicting and that to withdraw them is violative of the rights of the employees or their dependents. It is submitted that the rule must work both ways and that it is also violative of the employer's rights to decide such questions as matter of law.

Jurisdictional Statement.

(a) Jurisdiction to grant this petition is sustained by Section 237 of the Judicial Code as amended, subparagraph (b), Section 1, Chapter 229, 43 Statutes 937, Title 28, U. S. C. Section 344.

(b) The statutes of the United States applied by the

Supreme Court of Utah are 45 U. S. C. Sections 51-59; 35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404.

(c) The judgment of the Supreme Court of Utah was rendered on October 25, 1943 (R. 117). The petition for rehearing was deneid on December 27, 1943 (R. 117). This petition for certiorari was filed March 13, 1944.

Questions Presented.

The questions presented are whether the Supreme Court of Utah properly applied the United States statutes commonly called the Federal Employers Liability Act, or whether the application made by it is inconsistent with the applicable decisions of the Supreme Court of the United States, in that the Utah Court has held, by a divided court, in a case wherein the evidence and tendencies of the proof are conflicting, as matter of law, that Bruner was not guilty of contributory negligence and as matter of law that the Railroad was guilty of contributory negligence.

Reasons Relied On for Allowance of Writ.

The Supreme Court of Utah has decided a question of substance and importance in a way not in accord with the applicable decisions of the Supreme Court of the United States. If issues of negligence and contributory negligence are to be withdrawn from the consideration of juries under facts and circumstances such as are involved in this case, then a vast number of similar issues of negligence and contributory negligence will be withdrawn from juries at the instance of plaintiffs and defendants in cases arising under the Federal Employers Liability Act.

WHEREFORE, your petitioners pray that a Writ of Certiorari be issued by this Court to the Supreme Court of

Utah to the end that the judgment of said Court may be reviewed by this Honorable Court.

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION, AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION,

By P. T. FARNSWORTH, JR.,
WALDMAN Q. VAN COTT,
1311 Walker Bank Building,
Salt Lake City, Utah,
Their Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion of Courts Below.

The verdict of the jury and the judgment of the court pursuant thereto were rendered on June 6, 1942 (R. 9-10). The opinion of the Supreme Court of Utah is set forth at R. 103-117, is not yet reported in the Utah reports, but appears at 142 Pac. (2d) 649.

Grounds on Which Jurisdiction of Supreme Court of the United States Is Invoked.

The judgment of the Supreme Court of Utah was rendered on October 25, 1943 (R. 117). Petition for rehearing was denied on December 27, 1943 (R. 117). Petition for writ of certiorari was filed on March 18, 1944. The judgment of the Supreme Court of Utah is based upon its application of the United States statute commonly called the Federal Employers Liability Act, 45 U. S. C. Secs. 51-59; 35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404. The jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code, as amended by Act of February 13, 1925, c. 229, Sec. 1; 43 Stat. 937; 28 U. S. C. Sec. 344, and the Act of February 13, 1925, c. 229, Sec. 8; 43 Stat. 940; 28 U. S. C. Sec. 350.

Statement of the Case.

Bruner, an experienced engine hostler and hostler's helper (R. 16, 20), recovered judgment for $30,000.00 against the Railroad under the Federal Employers Liability Act on account of the loss of his right leg below the knee resulting from an accident in the course of his employment as hostler helper in Grand Junction, Colorado, on December 1, 1940 (R. 1-8). Bruner and his boss (R.

27, 91), Hostler Colosimo, were coaling two engines at the coal chute (R. 33). The engines were headed East, No. 1182 in the lead and No. 1149 in the rear (R. 28, 31). They were coupled together (R. 27). The coupling and relative positions of the two engines are shown in Exhibit 3 (R. 62A, admitted in evidence R. 62), and on Appendix A of this brief. The coal chute and track are shown on Exhibit B (R. 36A, admitted in evidence R. 37), and Exhibit E, (R. 40A, admitted in evidence R. 40).

Prior to the engines being moved to the coal chute Colosimo and Bruner discussed the movements to be made and the work to be done by each of them upon the engines (R. 31). Bruner knew that the engines were to be removed to the coal chute and that Colosimo would coal 1149 and Bruner would coal 1182 (R. 31). Colosimo moved the two engines, using the power of 1149, to the coal chute and spotted 1149 under the chute for coal loading (R. 82). While Colosimo was placing the coal in 1149 Bruner checked the fire in 1182 (R. 52-54). Having checked the fire in engine 1182 when the two engines were stopped, Bruner's next duty was to get to the top of the tender of 1182 in order to spot it at the coal chute and put coal into it (R. 41).

Colosimo, who was boss (R. 27, 91), told Bruner, who understood that he must do as Colosimo told him (R. 27), to stay on 1182 and coal it after Colosimo had coaled 1149 (R. 81). Bruner nevertheless, without telling Colosimo, dismounted from 1182, walked to the back of its tender and attempted to cross over the draw bars between the two engines for the purpose, as he himself testified, of getting on top of the tender of 1182 (R. 41). As Bruner was crossing over the draw bars Colosimo started the engines and Bruner was thrown to the tracks where the wheels of 1182 passed over his leg (R. 41). There is no evidence, suggestion or contention in the record that Colosimo knew that Bruner was between the engines.

As is more particularly shown in the argument, Bruner, who was in the cab of 1182, had several safe ways to get to the top of the tender of 1182 to spot and coal it without clambering over the draw bars or even dismounting from the engine. Bruner did not avail himself of any safe course, but chose to clamber over the draw bars without benefit of steps or handholds. In that precarious position a slight movement of the engine dislodeged him (R. 41).

On appeal to the Supreme Court of Utah the Railroad assigned as error (R. 103) that the court improperly instructed the jury in Instruction No. 6 (R. 11) that Bruner was not guilty of contributory negligence and that the court in Instructions 9 (R. 11, 12) and 20 (R. 12) improperly instructed the jury in failing to tell them to make proportionate deductions in damages if they found that Bruner was guilty of contributory negligence. The Supreme Court of Utah disposed of these assignments by reaching the conclusion as matter of law that Bruner was not guilty of contributory negligence (R. 107).

The Railroad also assigned as error (R. 108) that Instruction No. 6 (R. 10-11) improperly instructed the jury that Bruner was within the protection of two safety rules and that the court improperly instructed the jury in regard to safety rules not involved in the case. Those rules were as follows:

Safety Rules, Sec. 2057, provided:

> Engine bell or whistle warning must be given before engines are moved, then wait at least one minute.

Section 30 provided:

> The bell must be rung when an engine is about to move and while approaching and passing stations, tunnels, snow sheds and public crossing at grade.

The Utah Court stated (R. 108) that this Court considered the latter of these two rules in *Owens* v. *U. P. R. Co.*,

319 U. S. 715, 87 L. Ed. 1221, 63 S. Ct. 1271, but did not decide whether or not it was applicable to yard movements. The Utah Court stated that there was considerable doubt that these rules had any application to the case at bar, but disposed of the Assignment of Error by holding that it was not prejudicial error in any event because the Railroad was guilty of negligence as matter of law (R. 108).

Thus the Supreme Court of Utah has held as matter of law that on the evidence introduced the Trial Court would have been justified in peremptorily instructing the jury, thus eliminating those issues from the trial by jury, that the Railroad was guilty of negligence and that Bruner was not guilty of contributory negligence.

Specification of Errors.

The Supreme Court of Utah erred in holding as matter of law that Respondent was not guilty of contributory negligence.

The Supreme Court of Utah erred in holding as matter of law that Petitioners were guilty of negligence.

ARGUMENT.

I.

The majority opinion of the Supreme Court of Utah erred in holding as matter of law that respondent was not guilty of contributory negligence.

The majority opinion of the Utah Court at R. 105 states:

> * * * In order for the plaintiff to take coal on Engine 1182 it was necessary for him to be on top of the tender. There were several methods by which he could have climbed there. *At the point where he was standing at the rear of the north side of the tender there was no ladder leading to the top of the tender.* However, immediately across from this point on the rear of the

south side of the tender there was such a ladder. *To reach this ladder there were at least two direct methods he could have used.* One would have been to cross over the pilot (a flat platform on the front of the engine) on Engine 1149. The other way, the way he chose to go, was to climb over the draw bar between the two engines which were coupled together.

> • • • It was the plaintiff's duty to get on top of the tender on Engine 1182. *He chose a manner of getting there which is not shown by the evidence to be either unusual or dangerous.* In fact, the only evidence is that which he gave that he had often used this route and that it was a common practice among yardmen to do to. (R. 106)
>
> • • • *While it may be, as defendants argue in their brief, that the manner chosen was highly dangerous, there is no evidence to show this. We must conclude that the record does not show contributory negligence.* (R. 106-107) (Italics added)

The majority opinion of the Utah Court, when it reached the question of whether Bruner chose an unusual and dangerous way of getting on top of the tender of Engine 1182, placed Bruner at the rear of the north side of the tender. After so placing him, it points out that there was no ladder at that corner leading to the top of the tender and concludes that it was therefore necessary for him to cross from the north side to the south side. But Bruner did not start from the rear of the north side of the tender. He came to that point only enroute from the cab of Engine 1182 to the top of the tender (R. 41). There was no reason for Bruner to be on the north side of the engine or at the rear of the north side of the engine. He was in the cab of the engine when his duty required him to get to the top of the tender (R. 41).

At the time the two engines commenced backing from the sand house to the coal chute Bruner was on the south

running board of Engine 1182 (R. 31-32). Bruner then moved back along the south running board through the door into the cab of the engine and when the engine stopped he was in the cab of Engine 1182 (R. 41, 60). Being in the cab of the engine when it stopped he checked the fire, (R. 41), his next duty was to get to the top of the tender of 1182 in order to take coal from the coal chute (R. 41).

There were five different ways for him to reach his objective.

First. Without dismounting from the engine he could have moved straight back from the cab climbing up the coal gate of the tender, which is directly back of the gangway. (R. 99). This was the most direct and easiest way of reaching his objective.

At R. 100, Colosimo testified as follows:

> A. Yes sir. Some of them—they have so many ways of working—*some of them crawl up over the gates and get into them.*

For the better understanding of the court there is set forth in Appendix A a rough sketch illustrative generally of Engine 1182 with its tender, coupled to Engine 1149, and marked thereon by different types of lines are the various methods of moving from the cab to the tender. This sketch is not in evidence. It is illustrative of the situation involved which is established by the evidence. The solid black line marked No. 1 shows the direct route back from the cab up the coal gate on to the top of the tender.

Second. without dismounting from the engine he could move from the cab through the door leading to the running board and thence over the top of the cab to the tender. It was customary practice for enginemen to move from the running board over the cab on to the tender. At R. 85 Colosimo testified as follows:

> Q. How did the hostler's helper get onto the tank

to take coal on that front locomotive, after moving from the sand house?

A. Most of them are over the cab into the tender.

Q. How do they get over the cab?

A. They climb up on the boiler and just step right up on the cab there.

This second method, although more circuitous than the first, did not involve dismounting from the engine. In Appendix A it is shown by the dotted line marked No. 2.

Third. Bruner could have dismounted from the engine on the engineer's side, which was the same side on which the ladder going up the rear of the tank is placed, walk back on the ground along the right side of the engine to the ladder, climb the ladder on to the tender.[1] This was not as easy as the first or second methods, but it did not involve dismounting from the engine on the wrong side and then crawling over the draw bar. The third way is shown on Appendix A by the line of dashes marked No. 3.

Fourth. The fourth way, and that chosen by Bruner, was to dismount from the engine on the left side, which is the side away from that on which the ladder goes up the back of the tank, walk back along the wrong side of the engine to the north rear corner and then clamber over the draw bar. This course is shown on Appendix A by the line of crosses marked No. 4.[2] It was only after he chose this way and reached the north rear corner of the tank that he came enroute to the place where the majority opinion of the Utah Court places him when it describes his choice of routes preliminary to its conclusion that his choice was neither unusual nor dangerous.

---

[1] As shown on the rough sketch, this ladder is nearer the center of the rear of 1182 than it is in fact, as shown on Exhibit A (R. 34A, introduced in evidence R. 34), and Exhibit F, (R. 74A, introduced in evidence R. 74).

[2] The line of crosses on this rough sketch can be seen through the tender of 1182, indicating Bruner's movement on the north or left hand side of 1182.

Fifth. Even after reaching the rear of the tender on the north side and deciding to cross thru two live engines, Bruner had a perfectly safe way open to him, as is shown by Exhibit 3 (R. 62A, introduced in evidence at R. 62). This was to mount the step on the north side of the pilot of Engine No. 1149, step up to the pilot deck, take hold of the circular handhold around the front of the boiler of 1149, cross the deck, step down to the footstep on the south side, step across to the south footstep at the rear of the tender of 1182 and climb up the ladder at the rear of 1182. Exhibit 3 clearly shows all of this. The front of 1149 is designed for such a maneuver, as shown by the circular handhold. The rear of 1182 is not so designed, as is shown by the absence of a horizontal handhold. This way is shown on Appendix A by the line of alternate crosses and dashes marked No. 5.

It is true that Bruner could, within the realm of reason, choose his course, but that choice should not be a capricious, whimsical or outrageous choice. It is elementary in the law of principal and agent that although an agent may have latitude in choice of methods, yet he may not choose an outrageous method. If he does and it is dangerous, he is guilty of negligence. It is well established that it is negligence for an agent to chose a dangerous way of doing a thing when safe ways are open to him. *Atlantic Coast Line R. Co.* v. *Davis,* 279 U. S. 34, 73 L. Ed. 601, 49 S. Ct. 210.

The evidence shows that Bruner chose an unusual and dangerous way. Exhibit A. (R. 34A) shows the rear end of the tender of Engine No. 1182. The distance between the rails on which it stands is four feet eight and one-half inches, standard gauge. It can be seen from the picture that the tender overhangs the rail approximately two feet on each side. The ladder on the right hand side overhangs the right hand rail. The only handhold for Bruner to use

in mounting from the ground on the left hand side to the cross beam is vertical and extends downward to the left of the left rear corner of the tender of 1182. The distance from that handhold to the ladder is apparently between five and six feet.

It can be seen from Exhibit F (R. 74A) that there is no horizontal handhold crossing from the ladder, on the right, to the vertical handhold on the left, designed for the use of men crossing over the draw bar or on the cross beam. The only horizontal handhold on the rear of the tender of 1182 is that which is shown on Exhibits A and F (R. 34A and 74A) crossing immediately above the cross beam. There are two rods shown crossing immediately above the cross beam. The lower one is the rod which controls the pin lift lever. (R. 61) Immediately above that is the handhold provided for trainmen standing on the footsteps at the rear of 1182 (61-62).

It is not clear from Bruner's testimony whether he moved from the north to the south side by moving along the cross beam immediately under the pin lift lever rod, shown on Exhibit A (R. 34A) and Exhibit F. (R. 74A), or by crawling over the draw bar from one footstep to the other at the rear end of the tender of 1182. Examination of Exhibits 3, A and F (R. 62A, 34A and 74A) will demonstrate that either way is awkward, clumsy and dangerous. Also they disclose that such movement is not contemplated by the design of the safety appliance handholds.

Inspection of Exhibit 3 (R. 62A) shows that Bruner's evidence, that it is common practice to move from one side of 1182 to the other along the cross beam, is ridiculous and not entitled to serious consideration. It can be seen from Exhibit 3 that there is very little space, certainly not enough for a human foot clothed in a shoe to rest on that beam between the handhold and the rear end of the tank. It can be seen that a person attempting to move across that beam

would be entangled in the pin lift lever rod and the handhold. It is evident that it would be a most clumsy, awkward and dangerous movement. It cannot be contended that, in moving across on the cross beam, safety can be secured by holding on to the handhold provided for men riding the footsteps of 1182. A man attempting so to do would be leaning over in a position such that his hands would be just above his feet.

If Bruner's evidence means that he crawled over the draw bar from one footstep to the other, Exhibits 3, A and F show also that it was awkward, clumsy and dangerous. The draw bar would be almost waist high. It is also quite wide. Such a crossing is obviously not contemplated by the design of the safety appliance handholds. Handholds are provided wherever railroad men are supposed to hold on to prevent that very result. If Engine 1182 had been designed with the intention that trainmen would cross from the left hand side to the right hand side, along the cross beam, there would have been a horizontal handhold at a suitable height to hold on to while so doing. Inspection of all of the pictures in evidence shows handholds wherever trainmen are supposed to hold on engines. Thus Exhibit 1 (R. 56A) shows the handhold along the boiler to support enginemen moving on the running boards. The front of Engine 1182 shown on Exhibit 1 shows a handhold around the circumference of the front of the boiler and also a handhold across the pilot. Exhibit F shows a handhold at the right rear corner of the tank and at the left rear corner of the tank and a horizontal handhold running across the tank immediately above the cross beam. There is, however, no horizontal handhold shown across the top of the tank at a height designed to be used by a man moving across the rear of the tank. And the Safety Appliance Act and Rules and Regulations do not prescribe any such handhold.

It is submitted that Exhibits 3, A and F furnish the required evidence and show that it was unusual and dangerous for Bruner to cross either along the cross beam or clamber over the draw bar, and that the evidence demonstrates that Bruner chose a dangerous way when safe ways were available and thus under the law announced by this Court there was substantial evidence from which the jury would have been justified in finding that Bruner was guilty of contributory negligence.

II.

The majority opinion of the Supreme Court of Utah erred in holding that petitioners were guilty of negligence as matter of law.

The majority opinion at R. 110 concludes that the evidence on negligence is such that the trial court could have directed a verdict for plaintiff. If there is evidence from which the jury could find that Colosimo instructed Bruner to stay on the engine and that it was Bruner's duty to obey, then it cannot be said as matter of law that Colosimo owed Bruner the duty to anticipate that Bruner would disobey that order and that Colosimo's failure so to do constitutes negligence. It is submitted that there was such evidence.

Colosimo was in charge of the activities of Bruner. He was the boss (R. 27). Bruner recognized that. At R. 27 he said:

> Q. Who is the boss?
>
> A. The hostler, always, with the hostler helper. The hostler helper has to do whatever the hostler tells him to do.
>
> Q. You may state whether or not you worked under the direction of Mr. Colosimo during this shift?
>
> A. Yes, whatever he told me to do, that is what I did, and my business to do.

At R. 50 he said:

> Q. That was a part of your duties?
> A. My duty was to do whatever he told me to.

At R. 81 Colosimo testified as follows:

> I told him for him to sand 1182 *and stay on her and coal her,* and at the same time I would take care of the 1149.

He also testified at R. 102 as follows:

> A. I just told him to stay on the 1182. That is what I told him, just to stay on the 1182, and I would take care of the 1149.

On recross examination Colosimo testified as follows:

> By Mr. Black:
>
> Q. All you meant by that was that you would take care of 1149, and Bruner would take care of 1182?
> A. Yes sir (R. 102).

Can it be said that merely because Colosimo on recross examination testified that all he meant was that Bruner would take care of 1182 negatives the plain meaning of what he told Bruner? Colosimo told Bruner to stay on 1182 and coal it. Bruner's counsel asked Colosimo what he meant. Of course, what he meant by the words he spoke is immaterial. The material thing is the normal meaning of the words. The Utah Court used Colosimo's statement as to what he meant to render completely impotent the ordinary meaning of what he said and concluded that therefore as a matter of law Colosimo did not direct Bruner to stay on the engine (R. 106). Bruner himself did not take this view of the evidence that Colosimo directed him to stay on the engine, because he denied that Colosimo so instructed him (R. 70-71). Thus there was a conflict in the evidence as to

whether Colosimo instructed Bruner to stay on the engine. Colosimo said "Yes". Bruner said "No". The holding of the majority opinion of the Utah Court is that even though the jury might find that Colosimo did say, *"stay on the engine and coal it"*, this should be taken by Bruner to mean only *"coal it"* because on cross examination Colosimo said that was all he meant and, therefore, the jury should not be permitted to find that it meant anything else.

This attributes to Colosimo's statement the effect of an admission by defendants. It is as if the court reasoned, "Colosimo states that what he said meant only, 'coal it', therefore defendants are bound by it." This is unwarranted. No foundation was laid constituting Colosimo's statement an admission.

The majority opinion attributes to the failure of Colosimo to give a signal the same absolute liability that the statute attributes to a failure to comply with the requirements of the safety appliance law such as a failure to have a handhold or footstep or power brakes, etc. But with rare exception it is for the jury to say whether certain conduct is not up to the standard of an ordinarily prudent person and therefore negligence.

Tiller v. *Atlantic Coast Line R. Co., supra;*
Bailey v. *Central Vermont Ry., Inc., supra;*
Owens v. *Union Pacific R. Co., supra;*
Brady v. *Southern Railway Co., supra.*

As shown, the jury could have found that Colosimo told Bruner to stay on 1182 and coal it. Also, as shown under I, Bruner could get from the engine to the top of the tender without getting off the engine. He could have "stayed on the engine" and also "coaled it."

It is submitted that this evidence alone should preclude holding that defendants were guilty of negligence as matter of law.

Conclusion.

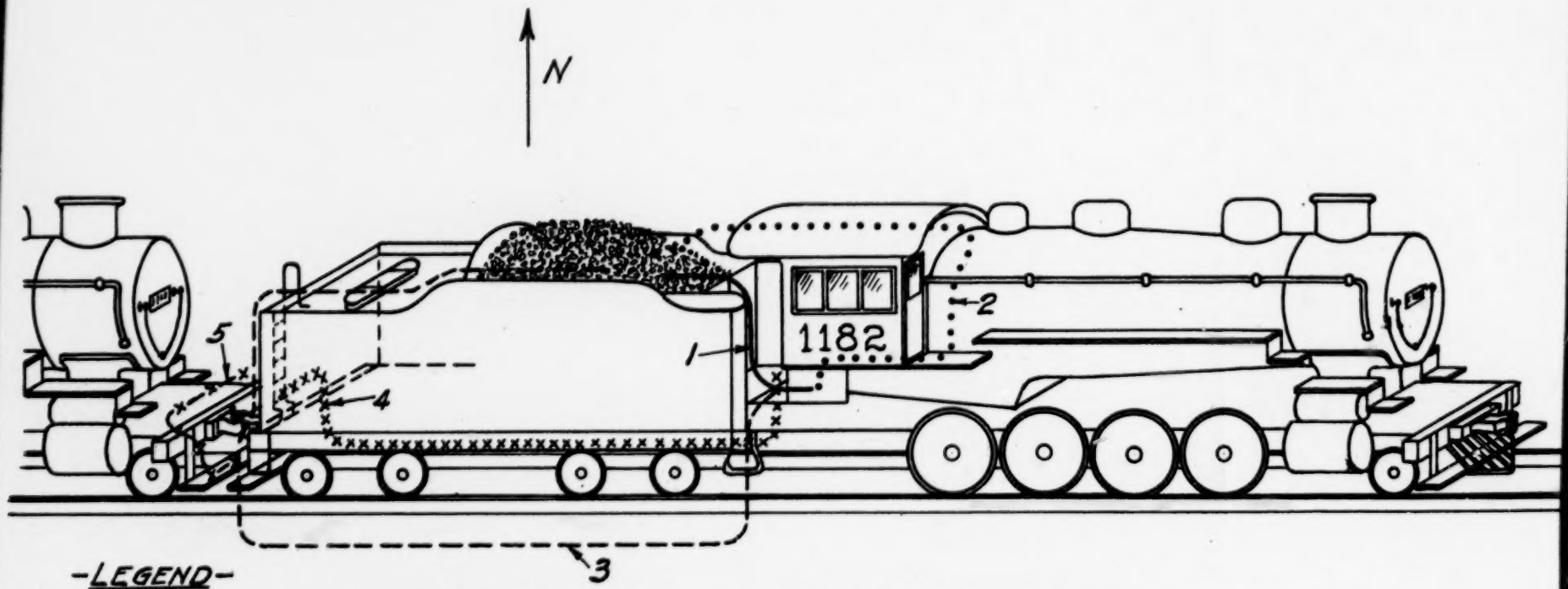
Petitioners pray that this Honorable Court grant this petition for writ of certiorari.

Respectfully submitted,

P. T. Farnsworth, Jr.,
Waldman Q. Van Cott,
Counsel for Petitioners.

(786)

Appendix-A



-LEGEND-

——— 1. Straight back from cab, up coal ladder to top of tender.

····· 2. Through front door of cab, over top of cab, to top of tender.

– – – 3. Dismount from cab to ground on engineers side, walk to rear of tender and climb ladder on engineer's side to top of tender.

××××× 4. Dismount from cab to ground on fireman's side walk to rear of tender, climb over the draw bars to engineer's side and climb ladder to top of tender.

—×—× 5. Same as No. 4 except across the pilot platform of No. 1149 instead of over the drawbars.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 803

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION, AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION,

Petitioners,

vs.

E. E. BRUNER,

Respondent.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari Complies with the Rules of the Supreme Court of the United States.

Paragraph 2 of Rule 38 reads: "The petition should contain a summary and short statement of the matter involved;—."

The summary and short statement of the matter involved set forth on pages 1 and 2 of the petition disclose the general nature of the case. The details of the case are set forth in the statement of the case in the brief which supports the summary and short statement.

Respondent's Contention that the Entire Charge to the Jury Should have been Included in the Record is Inconsistent with Respondent's Action in Regard to Petitioners' Praecipe for Record.

Respondent on pages 2 and 3 of his brief asserts that the entire charge of the court should have been set forth in the record. Petitioner followed the practice required by Rule 38, paragraph 8, of this Court, which admonishes counsel to stipulate to omit from the printed record all matters not essential to a consideration of the questions presented by the petitioner for the writ.

The Praecipe for Record (R. 118-122) requested in Items 6, 7, 8, 9, 10 and 11 (R. 119) that there be included in the certified record instructions to the jury Nos. 6, 9 and 20 and the exceptions thereto. This praecipe, together with copy of the petition for the writ of certiorari, was served on counsel for respondent on February 21, 1944. (R. 122.) At the suggestion of respondent, petitioners included in the praecipe Items Nos. 21, 22 and a statement regarding the record on appeal from the trial court to the Supreme Court of Utah. (R. 121, 122.) That these items were included at the request of respondent affirmatively appears in the praecipe itself, which reads: "At the suggestion of the respondent, appellants further request you to transcribe and certify the following portions of the record:—" (R. 121.) Then follows the request for Items 21, 22 and said statement.

In the praecipe as served upon counsel for respondent also appeared the following statement: "Said portions of the record are all of the material portions thereof necessary to a proper presentation and consideration in the Supreme Court of the United States of the questions presented by the Petition for Certiorari." (R. 122.)

It is submitted that the procedure followed constitutes a stipulation by the parties hereto that the portions of the record specified in the praecipe, together with those added by respondent, constituted all of the material portions of the record necessary to a proper presentation and consideration of the questions presented by the petition for certiorari.

Respondent's Brief Misconstrues Petitioner's Contention.

On page 3 respondent makes the misstatement that on page 8 of the brief of petitioners it is said "that the issue of negligence was not submitted to the jury—." No such statement is made on page 8 of petitioners' brief or elsewhere. The statement is made that the Supreme Court of Utah held as matter of law that the evidence introduced at the trial would have jusified the trial court in wihholding the issues of negligence and contributory negligence from the jury.

Petitioners have never contended that the trial court did not submit the issues of negligence or contributory negligence to the jury. Petitioners' contention has been that they were erroneously submitted. The Supreme Court disposed of those contentions by holding as matter of law that the railroad was negligent and that the employe was not guilty of contributory negligence. It is of those holdings that petitioners here complain and it is those holdings as to which petitioners seek certiorari.

That the Supreme Court did so hold is obvious from its opinion. Respondent on page 9 thus states the holding of the Supreme Court—"the Supreme Court of Utah determined that, as matter of law, the petitioners were liable and that respondent was free from contributory negligence, and hence assigned errors in regard to safety rules and instructions on contributory negligence could not have been prejudicial to the petitioners."

On page 4 respondent refers to the record as incomplete and jumbled and in other places on pages 3 to 7 urges that the record is incomplete with respect to the charge to the jury. It does not lie in respondent's mouth to complain of the record in view of the procedure described above.

Reply as to Respondent's Contention that he was not Guilty of Contributory Negligence as Matter of Law.

Respondent's brief discloses a misconception as to the nature of petitioners' contention. Petitioners do not contend that the evidence requires the conclusion that respondent was guilty of contributory negligence as matter of law but merely that the evidence required submission to the jury as to whether the respondent was guilty of contributory negligence. This misconception of respondent is evidenced by statements on page 12 of his brief and also by his reliance on the case of *Mathews* v. *Daly West Mining Co.* cited on page 13 of his brief. That case merely holds that the motions for non-suit and directed verdict made by the defendant were properly denied. It does not hold as matter of law that plaintiff was not guilty of contributory negligence.

Reply as to Respondent's Contention that Petitioners were Guilty of Negligence as Matter of Law.

Respondent makes the contention at the bottom of page 19 that this question is moot because respondent did not plead that Colosimo was negligent in failing to anticipate that respondent might disobey Colosimo's order. On the contrary the complaint affirmatively alleges that Colosimo was negligent in moving the engine without warning. (R. 3.)

It is asserted on page 20 that the record does not disclose that any such order was given by Colosimo. The evidence is set forth on pages 15 and 16 of petitioners' brief with references to the record where the evidence may be found.

It is also asserted on page 20 by respondent that the failure of Colosimo to anticipate the breach by Bruner of Colosimo's order did not in whole or in part cause the injuries sustained by respondent. It is the contention of petitioners that this cannot be said as matter of law.

Conclusion.

Petitioners pray that this Honorable Court grant their petition for writ of certiorari.

Respectfully submitted,

P. T. FARNSWORTH, JR.,
W. Q. VAN COTT,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 41

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION, AND THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION,

Petitioners,

vs.

E. E. BRUNER,

Respondent.

BRIEF OF PETITIONERS

Opinion of Courts Below

The verdict of the jury and the judgment of the trial court pursuant thereto were rendered on June 6, 1942 (R. 9-10). The only opinion by a court below is that of the Supreme Court of Utah which is set forth at R. 103-117, is not yet reported in the Utah reports, but appears at 142 Pac. (2d) 649.

Grounds on Which Jurisdiction of Supreme Court of the United States Is Invoked.

The judgment of the Supreme Court of Utah was rendered on October 25, 1943 (R. 117). Petition for rehearing was denied on December 27, 1943 (R. 117). Petition for writ of certiorari was filed on March 18, 1944, and was granted on May 1, 1944, 64 S. Ct. 1047. The judgment of the Supreme Court of Utah is based upon its application of the United States statute commonly called the Federal Employers Liability Act, 45 U. S. C. Secs. 51-59; 35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404. The jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code, as amended by Act of February 13, 1925, c. 229, Sec. 1; 43 Stat. 937; 28 U. S. C. Sec. 344, and the Act of February 13, 1925, c. 229, Sec. 8; 43 Stat. 940; 28 U. S. C. Sec. 350. Petitioner claimed in the Supreme Court of Utah and here that the Utah court, in holding as matters of law that Respondent was not guilty of contributory negligence and that Petitioner was guilty of negligence, impaired the substantial rights of Petitioner. This raises a federal question.

Brady v. *So. Ry. Co.*, 320 U. S. 476, 88 L. Ed. 189, 64 S. Ct. 232.
Garrett v. *Moore-McCormack Co.*, 317 U. S. 239, 87 L. Ed. 239, 63 S. Ct. 246.

Statement of the Case

E. E. Bruner (herein called "Bruner"), an experienced engine hostler and hostler's helper (R. 16, 20), recovered judgment for $30,000.00 against the Railroad under the Federal Employers Liability Act on account of the loss of his right leg below the knee resulting from an accident in the course of his employment as hostler helper with Wilson McCarthy and

Henry Swan, Trustees of The Denver and Rio Grande Western Railroad Company (herein called the "Railroad") in Grand Junction, Colorado, just before daylight on December 1, 1941 (R. 1-8). Bruner and his boss (R. 27, 91), Hostler Colosimo, were coaling two engines at the coal chute (R. 33). The engines were headed east, No. 1182 in the lead and No. 1149 in the rear (R. 28, 31). They were coupled together (R. 27). The coupling and relative positions of the two engines are shown in Exhibit 3 (R. 62A, admitted in evidence R. 62), and on Appendix A herein, which is an illustrative sketch not in evidence. The coal chute and track are shown on Exhibit B (R. 36A, admitted in evidence R. 35), and Exhibit E (R. 40A, admitted in evidence R. 40).

Prior to the engines being moved to the coal chute Colosimo and Bruner had handled the two engines and while other employees were cleaning the fires at the cinder pit, which is between the roundhouse and the coal chute, they discussed the movements to be made and the work to be done by each of them upon the engines (R. 31). Bruner was told and knew that the engines were to be removed to the sand house and then to the coal chute, which is north of the track leading from the roundhouse on which the accident occurred, and that Colosimo would coal 1149 and Bruner would coal 1182 (R. 31). Colosimo moved the two engines, using the power of 1149, to the coal chute and spotted 1149 under the chute for coal loading (R. 82). While Colosimo was placing the coal in 1149 Bruner checked the fire in 1182 (R. 53). Having checked the fire in engine 1182 when the two engines were stopped, Bruner's next duty was to get to the top of the tender of 1182 in order to spot it at the coal chute and put coal into it (R. 31, 41).

Colosimo, who was boss (R. 27, 91), told Bruner, who

understood that he must do as Colosimo told him (R. 27), to stay on 1182 and coal it after Colosimo had coaled 1149 (R. 81). Bruner testified that it was his duty to be in position to give signals to Colosimo to start the engine. (R. 28) Colosimo would have to be in the engineer's part of the cab in order to move the engine. (R. 65, 73) This was the right hand or south side of the engines. (R. 65) Accordingly Bruner should have remained on that side. Bruner nevertheless, without telling Colosimo, dismounted from 1182 on the left, the north side (R. 65, and see Appendix A), walked back of its tender and attempted to cross over the draw bars between the two engines for the purpose, as he himself testified, of getting on top of the tender of 1182 (R. 41). As Bruner was crossing over the draw bars Colosimo, assuming that Bruner was on 1182 (R. 101), started the engines and Bruner was thrown to the tracks where the wheels of 1182 passed over his leg (R. 41). There is no evidence, suggestion or contention in the record that Colosimo knew that Bruner was between the engines or intended to go between them.

As is more particularly shown in the argument, Bruner, who was in the cab of 1182, had several safe ways to get to the top of the tender of 1182 to spot and coal it without clambering over the draw bars or even dismounting from the engine. Bruner did not avail himself of any safe course, but chose to clamber over the draw bars. In that precarious position the first movement of the engines dislodged him (R. 41).

On appeal to the Supreme Court of Utah the Railroad relied upon the asserted errors (Statement of Errors Relied On[1]

[1] In the present appellate practice before the Supreme Court of Utah there are no assignments of error. Formerly there were. See Rules of Supreme Court of Utah, Rule VI, 85 Utah page X. The current Rules of the Supreme Court of Utah, effective March 1, 1941, eliminated that rule and in Rule VIII relating to briefs provides merely for a Statement of Errors Relied On. See 100 Utah page XLV.

Nos. 1, 2 and 3, R. 133) that the court in Instruction No. 6 (R. 10, 11) in effect told the jury that Bruner was not and could not be guilty of contributory negligence; and also relied upon the asserted errors (Statement of Errors Relied On Nos. 4, 5, 6 and 7, R. 133, 134) that the court in Instructions 9 (R. 11, 12) and 20 (R. 12) improperly instructed the jury in failing to tell them to make proportionate deductions in damages if they found that Bruner was guilty of contributory negligence. The Supreme Court of Utah *(Mr. Justice Larson dissenting,* R. 116) disposed of the errors so relied on by reaching the conclusion as matter of law that Bruner was not guilty of contributory negligence (R. 107).[2]

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[2] This court has repeatedly declared that it will generally regard the federal question as properly raised if the Supreme Court of the State regarded the question as properly raised according to its practice, as fairly before it for determination and decided it.

Murdock v. *Memphis*, 20 Wall, 590, 633, 634, 22 L. Ed. 429.
Kreiger v. *Shelby R. R. Co.*, 125 U. S. 39, 31 L. Ed. 675, 8 S. Ct. 752.
Fox Film Co. v. *Mullen*, 296 U. S. 207, 80 L. Ed. 158, 56 S. Ct. 183.
Indiana v. *Brand*, 303 U. S. 95, 82 L. Ed. 685, 58 S. Ct. 443.
Memphis Natural Gas Co. v. *Beeler*, 315 U. S. 649, 86 L. Ed. 1090, 62 S. Ct. 857.

It is also the law that State Courts in Federal Employers Liability Act cases follow their own rules of practice and procedure and that this court does not interest itself therein unless matters nominally of procedure are actually matters of substance which affect the federal right.

Lee v. *Central of Georgia Railway Co.*, 252 U. S. 109, 64 L. Ed. 482, 40 S. Ct. 254.
Minneapolis & St. Louis R. Co. v. *Bombolis*, 241 U. S. 211, 60 L. Ed. 961, 36 S. Ct. 595.

This court has specifically held that it is not concerned with matters of state practice with respect to instructions to the jury in Federal Employers Liability Act cases unless they involve the construction or application of the Act itself.

L. & N. R. Co. v. *Holloway*, 246 U. S. 525, 62 L. Ed. 867, 38 S. Ct. 379. On page 528 the court said:

> * * * Nor need we determine whether the local rule of practice, that if instructions are offered upon any issue respecting which the jury should be instructed and they are incorrect in form or substance it is the duty of the trial court to prepare or direct

The Railroad also relied upon the asserted error (Statement of Errors Relied On No. 2, R. 133) that Instruction No. 6 (R. 10-11) improperly instructed the jury that Bruner was within the protection of two safety rules and that the court improperly instructed the jury in regard to safety rules inapplicable to the case. Those rules were as follows:

Rule 2057 provided:

> Engine bell or whistle warning must be given before engines are moved, then wait at least one minute. (R. 5)

Rule 30 provided:

> The bell must be rung when an engine is about to move and while approaching and passing stations, tunnels, snow sheds and public crossing at grade. (R. 4.)

The Utah Court stated (R. 108) that this Court considered the latter of these two rules in *Owens* v. *U. P. R. Co.*, 319 U. S. 715, 87 L. Ed. 1683, 63 S. Ct. 1271, but did not decide whether or not it was applicable to yard movements. The Utah Court stated that there was considerable doubt that these rules had

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the preparation of a proper instruction upon the point in place of the defective one (see Chesapeake & Ohio Ry. Co. v. De Atley, 241 U. S. 310, 316) was applicable in the case at bar. That is a question of state law, with which we have no concern.

Central Vermont Ry. Co. v. *White*, 238 U. S. 507, 59 L. Ed. 1433, 35 S. Ct. 865.

It is the general rule that State courts are bound to proceed in such manner that all substantive rights of the parties under controlling Federal law are protected but that this court does not sit to review the propriety of the practice and procedure of the State courts.

Garrett v. *Moore-McCormack Co.*, 317 U. S. 239, 87 L. Ed. 239, 63 S. Ct. 246.

Lisenba v. *People of State of California*, 314 U. S. 219, 86 L. Ed. 166, 62 S. Ct. 280.

For these reasons it is assumed that this court will not be interested in the details of how this federal question was raised and preserved in the State court. If the court is interested the details are set forth in Appendix B.

any application to the case at bar, but disposed of the errors so relied on by holding *(Mr. Justice Moffat dissenting,* R. 117) that it was not prejudicial error in any event because the Railroad was guilty of negligence as matter of law (R. 108, 110).[3]

Thus the Supreme Court of Utah held as matter of law that on the evidence introduced, the trial court would have been justified in peremptorily instructing the jury, thus eliminating those issues from the trial by jury, that the Railroad was guilty of negligence and that Bruner was not guilty of contributory negligence. It held that the Railroad was not entitled to a *fair* jury trial of those issues because it was not entitled to *any* jury trial of those issues.

Specification of Errors.

The Supreme Court of Utah erred in holding as matter of law that Respondent was not guilty of contributory negligence.

The Supreme Court of Utah erred in holding as matter of law that Petitioners were guilty of negligence.

SUMMARY OF ARGUMENT

I. THE MAJORITY OPINION OF THE SUPREME COURT OF UTAH ERRED IN HOLDING AS MATTER OF LAW THAT RESPONDENT WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

In so holding the Supreme Court of Utah disregarded evidence which would support a finding that Bruner was

[3] For the reasons stated in footnote (2) it is not expected that this Court will be interested in the details of how the points decided by the Supreme Court of Utah were raised and preserved. If the details are of interest they are set forth in Appendix C.

negligent in four particulars. There is substantial evidence that Bruner chose an unnecessarily hazardous way of proceeding from the cab to the tender of 1182; violated his duty to stay in sight of Colosimo so as to give signals; disobeyed instructions from Colosimo to stay on 1182; and failed to inform Colosimo that he was going to climb over the draw bars between 1149 and 1182.

Bruner knew that Colosimo was coaling the westerly engine 1149 and would in the very near future move both engines westerly so as to spot 1182 for coal loading by Bruner. Colosimo would use the power of 1149 for that purpose. He would operate in the Engineer's side of the cab of 1149 and therefore would be on the south side of 1149. It was Bruner's duty to be in a position where he could give Colosimo a signal to move the engines. This required Bruner to be on or along the south side of Engine 1182.

Bruner could have fulfilled that duty and also reached the top of the tender of 1182, by getting down from engine 1182 on the south side, walking back along the south side of the engine to the tender and then climbing up the ladder to the top. Thus he would have been within the sight of the cab of 1149 at all times and would not have had to climb over any couplers or draw bars because the ladder up the rear end of the tender of 1182 was also on the south side of the couplers and draw bars.

Bruner could also have proceeded from the cab of 1182 to the top of its tender in two other ways without dismounting from the engine at all and without getting out of Colosimo's sight except for a very short time. First, he could have gone up the coal gate at the front of the tender of 1182. Secondly, he could have gone out the front door of the cab and up over the top of the cab on to the tender.

Instead of performing his duty in one of these three ways and moving safely to the place of his next duty, Bruner dismounted from the engine on the north side, the side away from the engineer's side, in a position where he could not be seen and where he could not give a signal to Colosimo. From there he walked to the rear of the tender and then climbed over the draw bars and couplers to reach the ladder on the south side. This was awkward, dangerous and without the benefit of safety appliances for the purpose.

In so doing Bruner disregarded the instructions given him by his boss Colosimo, which Bruner testified he was under the duty of obeying. Colosimo testified that he told Bruner to stay on 1182 and assumed that Bruner was on 1182, Bruner also failed to inform Colosimo that he was getting off 1182 and crawling over the draw bars between the two engines.

II. THE MAJORITY OPINION OF THE SUPREME COURT OF UTAH ERRED IN HOLDING THAT THE RAILROAD WAS GUILTY OF NEGLIGENCE AS MATTER OF LAW.

The Supreme Court of Utah held that there was considerable doubt as to whether the two rules relied on by Bruner were applicable to this case; but that that question was immaterial because the evidence showed that there was a custom and practice to move engines only upon signal from the hostler helper and after the hostler sounded the whistle; and that the evidence of this custom and practice established that the Railroad was guilty of negligence as a matter of law.

As to whether the violation of custom and practice constitutes negligence per se or whether it is merely one fact to be submitted to the jury, depends upon the facts and circumstances

of the case. This has been held both by this court and by the Supreme Court of Utah.

Colosimo, regardless of such practice and custom, had good reason to think that Bruner would be on engine 1182 in a position of safety. He had told him to stay there and it was Bruner's duty to obey that instruction. Moreover, it was Bruner's duty to be in a position such that he could signal to Colosimo when Colosimo was in the engineer's side of the cab of 1149 ready to operate the engine. This would require Bruner to be on or along the south side of the engine. It was also safest for Bruner to move from the cab of 1182 to the top of its tender on or along the south side of the engine.

Colosimo as a reasonable man need not anticipate that Bruner, instead of obeying Colosimo's instructions, instead of performing his duty to be in a position to transmit the signal, would get off the engine on the north side, walk back and then climb over the couplers and draw bars to get to the ladder which was on the south side.

The Railroad does not need to contend that the Utah court should have held as matter of law that Colosimo as a reasonable man need not anticipate that Bruner might place himself in that position of danger. It is only necessary to contend that on that question there was substantial evidence and that it should not have been decided as matter of law.

ARGUMENT

(All italics are added.)

I.

THE MAJORITY OPINION OF THE SUPREME COURT OF UTAH ERRED IN HOLDING AS MATTER OF LAW

THAT RESPONDENT WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

The majority opinion of the Supreme Court of Utah held that there was no evidence to show contributory negligence on the part of Bruner (R. 106) and therefore that the Railroad was not entitled to a *fair* jury trial of the issue of contributory negligence because it was not entitled to *any* jury trial of that issue. Mr. Justice Larson dissented. At R. 116 he said:

> As I read the evidence and authorities, the question of contributory negligence on the part of plaintiff *was a question for the jury.*

In *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 446, 63 S. Ct. 444; *Bailey* v. *Central Vermont Ry. Inc.*, 319 U. S. 350, 87 L. Ed. 1030, 63 S. Ct. 1062; *Owens* v. *Union Pacific R. Co.*, 319 U. S. 715, 87 L. Ed. 1683, 63 S. Ct. 1271, and *Brady* v. *Southern Railway Co.*, 320 U. S. 476, 88 L. Ed. 189, 64 S. Ct. 232, this Court held that questions should not be decided as matter of law where the evidence and tendencies of the proof are conflicting and that to withdraw them is violative of the rights of the employees or their dependents.

There is substantial evidence to support a finding that Bruner was guilty of contributory negligence in four particulars:

1. *Bruner chose an unnecessarily hazardous method of proceeding from the cab of engine 1182 to the top of the tender.*

2. *Bruner's choice of ways was in violation of the duty, which he testified he was under, to be in position to give signals to Colosimo.*

3. *There is evidence that Bruner disregarded the instructions of his boss in getting off engine 1182.*

4. *Bruner failed to inform his boss that he was going to clamber over the draw bars and coupler between engines 1182 and 1149.*

---

1. *Bruner chose an unnecessarily hazardous method of proceeding from the cab of engine 1182 to the top of the tender.*

The majority opinion of the Utah Court at R. 105 states:

> * * * In order for the plaintiff to take coal on engine 1182 it was necessary for him to be on top of the tender. There were several methods by which he could have climbed there. *At the point where he was standing at the rear of the north side of the tender there was no ladder leading to the top of the tender.* However, immediately across from this point on the rear of the south side of the tender there was such a ladder. *To reach this ladder there were at least two direct methods he could have used.* One would have been to cross over the pilot (a flat platform on the front of the engine) on Engine 1149. The other way, the way he chose to go, was to climb over the draw bar between the two engines which were coupled together.
>
> * * * It was the plaintiff's duty to get on top of the tender on Engine 1182. *He chose a manner of getting there which is not shown by the evidence to be either unusual or dangerous.* In fact, the only evidence is that which he gave that he had often used this route and that it was a common practice among yardmen to do so. (R. 106.)
>
> * * * *While it may be, as defendants argue in their brief, that the manner chosen was highly dangerous, there is no evidence to show this. We must conclude that the record does not show contributory negligence.* (R. 106-107)

The majority opinion of the Utah Court, when it reached the question of whether Bruner chose an unusual and dangerous way of getting on top of the tender of Engine 1182, placed Bruner at the rear of the north side of the tender. After so placing him, it points out that there was no ladder at that corner leading to the top of the tender and concludes that it was therefore necessary for him to cross from the north side to the south side. But Bruner did not start from the rear of the north side of the tender. He came to that point only enroute from the cab of Engine 1182 to the top of the tender (R. 41). There was no reason for Bruner to be on the north side of the engine or at the rear of the north side of the engine. He was in the cab of the engine when his duty required him to get to the top of the tender (R. 41).

At the time the two engines commenced backing from the sand house to the coal chute Bruner was on the south running board of Engine 1182 (R. 31-32). Bruner then moved back along the south running board through the door into the cab of the engine and when the engine stopped he was in the cab of Engine 1182 (R. 41, 60). Being in the cab of the engine when it stopped, he checked the fire (R. 41). His next duty was to get to the top of the tender of 1182 in order to take coal from the coal chute (R. 41).

There were five different ways for him to reach his objective.

First. Without dismounting from the engine he could have moved straight back from the cab climbing up the coal gate of the tender, which is directly back of the gangway. (R. 99, 100). This was the most direct and easiest way of reaching his objective.

At R. 100, Colosimo testified as follows:

> A. Yes, sir. Some of them—they have so many ways of working—*some of them crawl up over the gates and get into them.*

For the better understanding of the court there is set forth in Appendix A a sketch illustrative generally of Engine 1182 with its tender, coupled to Engine 1149, and marked thereon by different types of lines are the various methods of moving from the cab to the tender. This sketch is not in evidence. It is illustrative of the situation involved which is established by the evidence. The solid black line marked No. 1 shows the direct route back from the cab up the coal gate on to the top of the tender.

Second. Without dismounting from the engine he could move from the cab through the door leading to the running board and thence over the top of the cab to the tender. It was customary practice for enginemen to move from the running board over the cab on to the tender. At R. 85 Colosimo testified as follows:

> Q. How did the hostler's helper get onto the tank to take coal on that front locomotive, after moving from the sand house?
>
> A. Most of them are over the cab into the tender.
>
> Q. How do they get over the cab?
>
> A. They climb up on the boiler and just step right up on the cab there.

This second method, although more circuitous than the first, did not involve dismounting from the engine. Colosimo testified that this was the easiest way for Bruner to get on to the tender from the running board (R. 101). In Appendix A it is shown by the dotted line marked No. 2.

Third. Bruner could have dismounted from the engine on the south side, which was the same side on which the ladder going up the rear of the tank is placed, walked back on the ground along the south side of the engine to the ladder, and climbed the ladder on to the tender.[4] This was not as easy as the first or second methods, but it did not involve dismounting from the engine on the wrong side and then crawling over the draw bar. The third way is shown on Appendix A by the line of dashes marked No. 3.

Fourth. The fourth way, and that chosen by Bruner, was to dismount from the engine on the north side, which is the side away from that on which the ladder goes up the back of the tank, walk back along the wrong side of the engine to the north rear corner and then clamber over the draw bar. This course is shown on Appendix A by the line of crosses marked No. 4.[5] It was only after he chose this way and reached the north rear corner of the tank that he came enroute to the place where the majority opinion of the Utah Court places him when it describes his choice of routes preliminary to its conclusion that his choice was neither unusual nor dangerous.

Fifth. Even after reaching the rear of the tender on the north side and deciding to cross through two live engines, Bruner had a perfectly safe way open to him, as is shown by Exhibit 3 (R. 62A, introduced in evidence at R. 62). This was to mount the step on the north side of the pilot of Engine No. 1149,

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[4] As shown on the sketch, Appendix A, this ladder is nearer the center of the rear of 1182 than it is in fact, as shown on Exhibit A (R. 34A, introduced in evidence R. 34), and Exhibit F (R. 74A, introduced in evidence R. 74).

[5] The line of crosses on this rough sketch can be seen through the tender of 1182, indicating Bruner's movement on the north or left hand side of 1182.

step up to the pilot deck, take hold of the circular handhold around the front of the boiler of 1149, cross the deck, step down to the footstep on the south side, step across to the south footstep at the rear of the tender of 1182 and climb up the ladder at the rear of 1182. Exhibit 3 clearly shows all of this. The front of 1149 is designed for such a maneuver, as shown by the circular handhold. The rear of 1182 is not so designed, as is shown by the absence of a horizontal handhold at a convenient height. This way is shown on Appendix A by the line of alternate crosses and dashes marked No. 5.

It is true that Bruner could, within the realm of reason, choose his course, but that choice may not be a capricious, whimsical or outrageous choice. It is elementary in the law of principal and agent that although an agent may have latitude in choice of methods, yet he may not choose an outrageous method. If he does and it is dangerous, he is guilty of negligence. It is well established that it is negligence for an agent to choose a dangerous way of doing a thing when safe ways are open to him.

Atlantic Coast Line R. Co. v. *Davis*, 279 U. S. 34, 73 L. Ed. 601, 49 S. Ct. 210.
Fritz v. *The Salt Lake and Ogden Gas and Electric Light Co.*, 18 Utah 493, 56 Pac. 90.
Beulah Coal Mining Co. v. *Verbrugh*, 292 Fed. 34, (8th C. C. A.).
H. D. Williams Cooperage Co. v. *Headrick*, 159 Fed. 680 (8th C. C. A.).

The evidence shows that Bruner chose an unusual and dangerous way. Exhibit A (R. 34A, introduced in evidence at R. 34) shows the rear end of the tender of Engine No. 1182. The distance between the rails on which it stands is four feet eight and one-half inches, standard gauge. It can be seen

from the picture that the tender overhangs the rail approximately two feet on each side. The ladder on the right hand side overhangs the right hand rail. The only handhold for Bruner to use in mounting from the ground on the left hand side to the cross beam is vertical and extends downward to the left of the left rear corner of the tender of 1182. The distance from that handhold to the ladder is apparently between five and six feet.

In can been seen from Exhibit F (R. 74A, introduced in evidence at R. 74) that there is no horizontal handhold crossing from the ladder, on the right, to the vertical handhold on the left, designed or convenient for the use of men crossing over the draw bar or on the cross beam. The only horizontal handhold on the rear of the tender of 1182 is that which is shown on Exhibits A and F (R. 34A and 74A) crossing immediately above the cross beam. There are two rods shown crossing immediately above the cross beam. The lower one is the rod which controls the pin lift lever. (R. 61) Immediately above that is the handhold provided for trainmen standing on the footsteps at the rear of 1182. (R. 61-62, 75)

It is a permissible inference from Bruner's testimony that he intended to move from the north to the south side by moving along the cross beam immediately under the pin lift lever rod, shown on Exhibit A (R. 34A) and Exhibit F (R. 74A), rather than by crawling over the draw bar from one footstep to the other at the rear end of the tender of 1182 (R. 75). Examination of Exhibits 3, A and F (R. 62A, 34A and 74A) will demonstrate that either way is awkward, clumsy and dangerous. Also they disclose that such movement is not contemplated by the design of the safety appliance steps and handholds.

Inspection of Exhibit 3 (R. 62A) shows that Bruner's

evidence, given in response to leading questions by his own counsel, that it is common practice to move from one side of 1182 to the other along the cross beam, is ridiculous and not entitled to serious consideration. Particularly is this so in view of Bruner's reluctance to answer leading and suggestive questions put to him by his own counsel. At R. 75, 76 he testified as follows:

> Q. You may state whether or not, in the course of your employment as a hostler, or a hostler's helper and fireman, you have occasion to cross from one side to the other of an engine coupled to a tender, and to pass over the drawbar?
>
> A. Yes, many times I have had occasion to. I did so many times. It is a common practice to get off and go up that way.
>
> Q. *There is no effort at all?*
>
> A. *I have had occasion to.*

His counsel attempted to induce Bruner to testify that it was "no effort at all." Bruner would only go so far as to say, "I have had occasion to."

It can be seen from Exhibit 3 that there is very little space, certainly not enough for an adult human foot clothed in a shoe to rest on that beam between the handhold and the rear end of the tank. It can be seen that a person attempting to move across that beam would be entangled in the pin lift lever rod and the handhold. It is evident that it would be a clumsy, awkward and dangerous movement. It cannot be contended that, in moving across on the cross beam, safety can be secured by holding on to the handhold provided for men riding the footsteps of 1182. A man attempting so to do would be leaning over in a position such that his hands would be just above

his feet, almost certain to fall whether the engine moved or not.

If Bruner's evidence means that he crawled over the draw bar from one footstep to the other, Exhibits 3, A and F show that that also was awkward, clumsy and dangerous. The draw bar would be almost waist high. It is also quite wide. Such a crossing is obviously not contemplated by the design of the safety appliance handholds. Handholds are provided wherever railroad men are supposed to hold on to prevent that very result. If Engine 1182 had been designed with the intention that trainmen would cross from the left hand side to the right hand side, along the cross beam, there would have been a horizontal handhold at a suitable height to hold on to while so doing, as well as a suitable footway much broader than the cross beam. Inspection of all of the pictures in evidence shows handholds wherever trainmen are supposed to hold on engines. Thus Exhibit 1 (R. 56A, introduced in evidence at R. 55) shows the handhold along the boiler to support enginemen moving on the running boards. The front of Engine 1182 shown on Exhibit 1 shows a handhold around the circumference of the front of the boiler and also a handhold across the pilot. Exhibit F shows a handhold at the right rear corner of the tank and at the left rear corner of the tank and a horizontal handhold running across the tank immediately above the cross beam. There is, however, no horizontal handhold shown across the top of the tank at a height designed to be used by a man moving across the rear of the tank of 1182.

It is submitted that Exhibts 3, A and F show that it was unusual and dangerous for Bruner to cross either along the cross beam or clamber over the draw bar, and that the evidence

demonstrates that Bruner chose a dangerous way when safe ways were available and thus under the law announced by this Court there was substantial evidence from which the jury would have been justified in finding that Bruner was guilty of contributory negligence.

The Supreme Court of Utah said (R. 106, 107) that there was no evidence to show that this was dangerous. The physical facts are shown by the pictures, Exhibits 3, A and F. What further evidence could there be? The opinion or conclusion of some witness? It would be objectionable as such. If the issue were whether a person was negligent in crossing over a third rail in a subway and pictures of the physical facts were in evidence, would it be necessary to have some witness express the opinion that it is dangerous? It is submitted that the physical facts and circumstances are real evidence and that the situation involved does not justify or require the opinion of an expert to aid the jury in perceiving the danger.

It is submitted that the above is sufficient evidence to sustain a finding of contributory negligence.

2. *Bruner's choice of ways was in violation of the duty, which he testified he was under, to be in position to give signals to Colosimo.*

Bruner testified that it was his duty to be wherever he had to be to give signals so they would be seen by the hostler Colosimo. At R. 28 Bruner testified as follows:

> Q. Where would the helper be?
> A. Wherever his work was to be, he would be wherever he had to be to give the signals so they would be seen.

The next move after 1149 was coaled was for Colosimo

to move the two engines westerly to spot 1182 in position to be coaled. (R. 83) This would be done by Colosimo in the engineer's side of the cab of 1149. (R. 65, 73) This was the right hand or south side of the cab. (R. 65) Colosimo, in the engineer's side of the cab of 1149, could see Bruner if Bruner were on that same side of the engines. Colosimo could not see Bruner if Bruner were on the left hand or north side of the engines. (R. 73, Appendix A.)

As is shown above, Bruner could have dismounted from engine 1182 on the south side and moved back along the south side to the rear of 1182. If he had done so he would have been in sight of Colosimo in the engineer's side of the cab of 1149. By so doing Bruner would have been fulfilling his duty, which he himself said he was under, of being in position to give Colosimo a signal.

Nevertheless Bruner dismounted from the left hand or north side of 1182 where he couldn't be seen by Colosimo and could not give a signal to Colosimo. (R. 73) Thus, according to his own testimony, he violated his duty.

The Railroad's contention does not go to the extent of claiming that Bruner could never get out of sight of the engineer's cab of 1149. No doubt he could do so in the performance of other duties. But at the moment in question Bruner had completed his work on 1182 except to coal it. The next thing to be done was to move the engines so as to spot 1182 for coaling. According to Bruner that move would be made only on signal from Bruner to Colosimo. (R. 24, 27) Why then, if Bruner decided to get down from the engine at all, didn't he get down on the south side, the engineer's side of 1149 where Colosimo in the cab could see him? It was easier than the north side because it didn't involve crossing over the draw bars. It was safer, as shown above under I-1.

It is submitted that this was evidence sufficient to justify a finding of contributory negligence.

3. *There is evidence that Bruner disregarded the instructions of his boss in getting off engine 1182.*

The evidence is uncontradicted that Colosimo was the boss and that it was Bruner's duty to obey his instructions. There is also evidence from which the jury could find that Colosimo instructed Bruner to stay on Engine 1182 and that it was negligent of Bruner to disregard that order.

Colosimo was in charge of the activities of Bruner. He was the boss (R. 27). Bruner recognized that. At R. 27 he said:

> Q. Who is the boss?
> A. The hostler, always, with the hostler helper. The hostler helper has to do whatever the hostler tells him to do.
>
> Q. You may state whether or not you worked under the direction of Mr. Colosimo during this shift?
> A. Yes, whatever he told me to do, that is what I did, and my business to do.

At R. 50 he said:

> Q. That was a part of your duties?
> A. My duty was to do whatever he told me to.

At R. 81 Colosimo testified as follows:

> I told him for him to sand 1182 *and stay on her and coal her*, and at the same time I would take care of the 1149.

Colosimo testified at R. 102 as follows:

> A. I just told him to stay on the 1182. That is

what I told him, just to stay on the 1182, and I would take care of the 1149.

On recross-examinaton Colosimo testified as follows:

By Mr. Black:

Q. All you meant by that was that you would take care of 1149, and Bruner would take care of 1182?
A. Yes, sir (R. 102).

Counsel for Bruner have argued that merely because Colosimo on recross-examination testified that all he meant was that Bruner would take care of 1182 negatives the plain meaning of what he told Bruner. Colosimo told Bruner to stay on 1182 and coal it. Bruner's counsel asked Colosimo what he meant. Of course, what he meant by the words he spoke is immaterial. The material thing is what the words would mean to an ordinary railroad man. The Utah Court used Colosimo's statement as to what he meant to render completely impotent the ordinary meaning of what he said and concluded that therefore as a matter of law Colosimo did not direct Bruner to stay on the engine (R. 106). Bruner himself did not take this view of the evidence that Colosimo directed him to stay on the engine, because he denied that Colosimo so instructed him (R. 70-71). Thus there was a conflict in the evidence as to whether Colosimo instructed Bruner to stay on the engine. Colosimo said "Yes." Bruner said "No." The holding of the majority opinion of the Utah Court is that even though the jury might find that Colosimo did say, *"stay on the engine and coal it,"* this should be taken by Bruner to mean only *"coal it"* because on cross-examination Colosimo said that was all he meant and, therefore, the jury should not be permitted to find that it meant anything else.

This attributes to Colosimo's statement the effect of an admission by defendants. It is as if the court reasoned, "Colosimo states that what he said meant only, 'coal it,' therefore defendants are bound by it." This is unwarranted. No foundation was laid constituting Colosimo's statement an admission.

Meyers v. *S. P. L. A. & S. L. R. Co.*, 36 Utah 307, 104 Pac. 736; 39 Utah 198, 116 Pac. 1119.

It is submitted that the jury could have found that Colosimo instructed Bruner to stay on Engine 1182, that it was Bruner's duty to obey Colosimo and that Bruner disobeyed. Was this contributory negligence? Consider the conditions under which the order was given. The hostler Colosimo and his helper Bruner were preparing these engines for service. They had been brought from the round house. (R. 31, 79) They were moved to the cinder pit to have the fires cleaned. (R. 31, 80) They were moved to the sand house and supplied with sand. (R. 31, 80) Then they were moved to the coal chute to be loaded with coal. (R. 31) Then they would be moved to the water spout to be supplied with water and finally they would be taken to the point where they would be used. (R. 51, 80.) It was a process of movement from one point to another. Bruner was an experienced hostler helper. (R. 17) He knew what was to be done. (R. 31) He knew that coal was to be put in both engines. (R. 33) The two engines could not be coaled at the same time. (R. 55) Bruner knew that after Colosimo coaled 1149 he would have to move the engines so that Bruner could coal 1182. (R. 55) It was really the duty of the hostler helper to put coal in the engines. (R. 45, 50) But Colosimo told Bruner that he would coal 1149 and for Bruner "just to stay on 1182." Why did Colo-

simo so do? Is it not a fair inference that it was to expedite the work? Colosimo was on 1149 and would coal it instead of Bruner; then Colosimo would move the two engines and Bruner would coal 1182; and then they would move the engines away from the coal chute. Thus Bruner knew that as soon as Colosimo finished coaling 1149 it would be in order for Colosimo to move both engines so that Bruner could coal 1149. Colosimo had told Bruner to sand 1182 and "stay on her and coal her." Under those circumstances, Bruner as a reasonable man should have realized that Colosimo might expect Bruner to stay on 1182 and that he could safely move the engines.

It is submitted that the evidence was sufficient to sustain a finding of contributory negligence.

4. *Bruner failed to inform his boss that he was going to clamber over the draw bars and coupler between engines 1182 and 1149.*

If, however, Bruner had some reason to disregard the instruction of Colosimo to stay on 1182 and to clamber over the couplers and draw bars of two live engines, which he knew were to be moved in the near future, he should have notified Colosimo of his intention. It is submitted that the finder of facts would be justified in concluding that it was a lack of ordinary care for him to fail so to do.

II.

THE SUPREME COURT OF UTAH ERRED IN HOLDING THAT PETITIONERS WERE GUILTY OF NEGLIGENCE AS MATTER OF LAW.

The Railroad relied upon the error (R. 133) that the trial court in Instruction No. 6 told the jury that Bruner had

the right to presume and *act upon the presumption* that Colosimo would obey and not violate Rule 2057 reading as follows:

> Engine bell or whistle warning must be given before engines are moved, then wait at least one minute.

and Rule 30 reading as follows:

> The bell must be rung when an engine is about to move and while approaching and passing stations, tunnels, snow sheds and public crossing at grade.

The Railroad contended that the instruction was erroneous because the rules were inapplicable to the case at bar. (See Appendix C) The Supreme Court of Utah avoided that question by reasoning that, entirely aside from the rules, there was a practice or custom established by Bruner's evidence that engines would be moved only on signal and then only after giving a signal (R. 108-110), and that the trial court would have been justified in directing a verdict for plaintiff, thus holding as matter of law that the Railroad was guilty of negligence. (R. 110)

Mr. Justice Moffat dissented, stating that he thought the evidence does not establish negligence as a matter of law. (R. 117)

It can not be argued that such a practice or custom is wholly inflexible and could not be departed from even by agreement between the workers involved. Suppose for example that Bruner and Colosimo expressly agreed that Bruner was to stay in the cab of the engine and that Colosimo would move the engines without signal or whistle as soon as he finished coaling 1149. It would hardly be contended that under such circumstances moving the engine without signal or whistle would constitute negligence as to Bruner.

Customs and practices do not rise to higher authority than express rules and regulations. They are at most informal rules. The master has not decreed and promulgated them. The workmen have themselves merely established a practical method.*

Far from being binding or inflexible, custom and practice are admissible, if at all, only as some evidence of what ought to have been done in the exercise of reasonable care.

Texas and Pacific R. Co. v. *Behymer*, 189 U. S. 468, 47 L. Ed. 905, 23 S. Ct. 622. On page 470 the court said:

> * * * What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.

The Supreme Court of Utah has said that violation of a safety rule does not necessarily constitute negligence as a matter of law and that whether it does so or not depends upon the facts and circumstances of each case.

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* In *Owens* v. *Union Pacific R. Co.*, supra, this court declined to consider the propriety of the court's instruction regarding the applicability and effect of Rule 30 because the Court of Appeals did not reach that question. So in the case at bar the Supreme Court of Utah did not reach similar questions with respect to Rules 30 and 2057. It is therefor assumed that this court will find no occasion to decide the question.

If this court does consider the question and decides that they are applicable, the Railroad relies on the same argument herein made as to custom and practice. Indeed the cases cited for the proposition that disregard of a custom or practitce is merely one circumstance to be submitted to the jury are cases involving disregard of rules. They are relied on by analogy for the proposition that disregard of a practice or custom is merely one circumstance to be considered by the jury.

If the court is interested in the Railroad's argument that Instruction No. 6 erroneously assumes as matter of law that Bruner at the time of the accident was within the protection of Rules 30 and 2057 it is set forth in Appendix D.

Allison v. *McCarthy et al.*, 147 Pac. (2d) 870, Utah (not yet officially reported). On page 872 the court said:

> The following cases are in harmony with the view point that whether or not a violation of a safety rule constitutes negligence as a matter of law or is a question for the jury depends upon the facts and circumstances of each case.

One case cited by the Utah court for the foregoing proposition is *Rocco* v. *Lehigh Valley R. Co.*, 288 U. S. 275, 77 L. Ed. 743, 53 S. Ct. 343, in which this court held that violation of a safety rule by Rocco was one circumstance for consideration of the jury and did not hold that it established negligence as matter of law.

Such also was the effect given by this court to a violation of a rule requiring the sounding of a whistle before moving an engine (the very same rule involved in the case at bar) in *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 88 L. Ed. 322, 64 S. Ct. 409, in which the court said, page 411:

> As to the proof of negligence, the court below correctly held that it was sufficient to present a jury question. In view of respondent's own rule that a bell must be rung "when an engine is about to move," it was not unreasonable for the jury to conclude that the failure to ring the bell under these circumstances constituted negligence. This was not an operation where bell ringing might be termed unnecessary or indiscriminate as a matter of law.

There were facts and circumstances in the case at bar which made it a jury question as to whether Colosimo, in the exercise of reasonable care, should have followed the customs and practices of awaiting Bruner's signal to move and giving a warning whistle signal.

As is shown under I, 2, Bruner testified that it was his duty to be in a position to give hostler Colosimo signals to move the engines. And it is demonstrated that Bruner could not perform that duty on the north side of the engine. There is also the evidence of Colosimo that he could have seen Bruner if Bruner was on top of the tender of 1182 if Bruner was showing a light. Under the evidence, to perform that duty Bruner would have to be either on the ground on the south side of the engines or on the south side of the engines.

Would not the jury be justified under the evidence in finding that Bruner should have been in such position? Would it not be justified in finding that Colosimo, in the exercise of reasonable care, need not anticipate the possibility of Bruner getting down on the north or left hand side of the engines, out of sight and unable to give a signal to Colosimo?

Moreover, there is evidence that would justify the jury in finding that Colosimo told Bruner to stay on 1182. (R. 81) It is uncontradicted in the evidence that if Colosimo did tell Bruner to stay on the engines, it was Bruner's duty to obey. (R. 27) Thus the jury under the evidence could have found that Colosimo, the boss, told Bruner to stay on 1182; that it was Bruner's duty to obey; that Colosimo had the right to assume, as he testified he did (R. 101) that Bruner would stay on 1182, would not get down on to the ground, and was therefore on engine 1182 in a position of safety; that Colosimo as a reasonable man was not under the necessity of anticipating that Bruner in violation of his duty and Colosimo's instruction had climbed down on the north, the wrong side, and walked back and was clambering over the draw bars between 1149 and 1182; and that Colosimo as a reasonable man was justified in thinking, as he says he did (R. 101), that Bruner was on the tender of 1182.

It is well settled law that in determining whether a defendant is guilty of negligence, it is necessary that he anticipate only such possibilities as may be reasonably expected.

A. T. & S. F. Ry. Co. v. *Calhoun*, 213 U. S. 1, 53 L. Ed. 671, 29 S. Ct. 321. On page 9 the court said:

> * * * It becomes necessary, therefore, to inquire whether the defendant was negligent in leaving the truck there. But even where the highest degree of care is demanded, still the one from whom it is due is bound to guard only against those occurrences which can reasonably be anticipated by the utmost foresight. It has been well said that "if men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things." Pollock on Torts, 8th ed. 41.

And on page 10:

> * * * There was a wooden platform by the track at the station 100 feet more or less in length. The truck was left at the very end of this platform, with the greater part off it. The train was at rest, so that no part of it from which passengers might be expected to get off or on was near the truck. It was, of course, dark at the point where the truck was, but no one could foresee that passengers intending to leave or enter the train would be at that point. No amount of human foresight which could reasonably be exacted as a duty could anticipate that a passenger, after the train had started, would run a distance of from 75 to 100 feet with the purpose of boarding a train moving with increasing rapidity, much less that a person would take a helpless infant and while thus running attempt to place it on the train. *We are of the opinion that the railroad was*

not bound to foresee and guard against such extraordinary conduct, and that its failure to do so was not negligence. For these reasons the judgment must be reversed.

So in the case at bar it is submitted that the jury could under the evidence have found that Colosimo in the exercise of reasonable care was not bound to foresee and guard against the extraordinary conduct of Bruner in violating both his duty and the instruction given him by Colosimo, was not bound to anticipate that Bruner would unnecessarily place himself in the hazardous position of clambering over the draw bars.

The principle above relied on from the Calhoun case is entirely distinct from the law of proximate cause and has been repeatedly so applied.[7]

Kansas City So. Ry. Co. v. *Pinson*, 23 Fed. (2d) 247, (5th C. C. A.)

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[7] The Calhoun case is especially interesting because in it are separately discussed two distinct principles of the law of negligence which are sometimes confused.

First, There is a principle of the law relating to proximate cause (discussed on pages 7 and 8) that an actor who puts in motion a train of circumstances is not liable for consequences of his act which are not natural and probable consequences and which ought not to have been foreseen by a reasonably prudent man. This court applied that principle to the negligence alleged against the railroad that it was negligent in not giving the mother of the injured child a reasonable opportunity to detrain. This court held that it was not a natural and probable consequence of such failure that a man to whom she handed the child from the moving train would hand it to another, who would chase the train and try to put the child back on. The Railroad in the case at bar bases no contention on this principle.

Second, There is a principle of the law of negligence (discussed on pages 9 and 10), that the duty to exercise care does not extend to anticipating occurrences which are not reasonably to be anticipated. This court applied that principle to the allegation that the railroad was negligent in leaving a baggage truck on the platform on which the man chasing the train stumbled thus causing the injury to the child. This court held that the railroad was not negligent in leaving the truck in that position because it was not reasonably to be anticipated that injury would result therefrom. That is the principle on which the Railroad in the case at bar bases its present contention.

Fort Smith Gas Co. v. *Cloud*, 75 Fed. (2d) 413, (8th C. C. A.)
Virginia Ry. Co. v. *Station*, 84 Fed. (2d) 133 (4th C. C. A.)
C. St. P. M. & O. Ry. Co. v. *Elliott*, 55 Fed. 949 (8th C. C. A.)

The Railroad is not contending, as was held in some of the above cited cases, that it should be held as matter of law that Colosimo as a reasonable man need not have anticipated that Bruner might be in a position of danger, and that the jury would not be permitted so to find. Its contention is that there were facts and circumstances such that it should not have been decided by the Supreme Court of Utah as matter of law that Colosimo was negligent and that the trial court would have been justified in directing a verdict for the plaintiff on that issue.

The evidence of the custom and practice as to giving signals, the duty of Bruner to be in a position to give signals, the facts with respect to the methods of getting from the cab of 1182 on to the tender should be questions of fact for the determination of the jury—not decided as matter of law.

Tiller v. *Atlantic Coast Line R. Co.*, supra
Bailey v. *Central Vermont Ry. Inc.*, supra.
Owens v. *Union Pacific R. Co.*, supra
Brady v. *Southern Ry. Co.*, supra

It is submitted that the decision of the Supreme Court of Utah violates the principles announced in those cases.

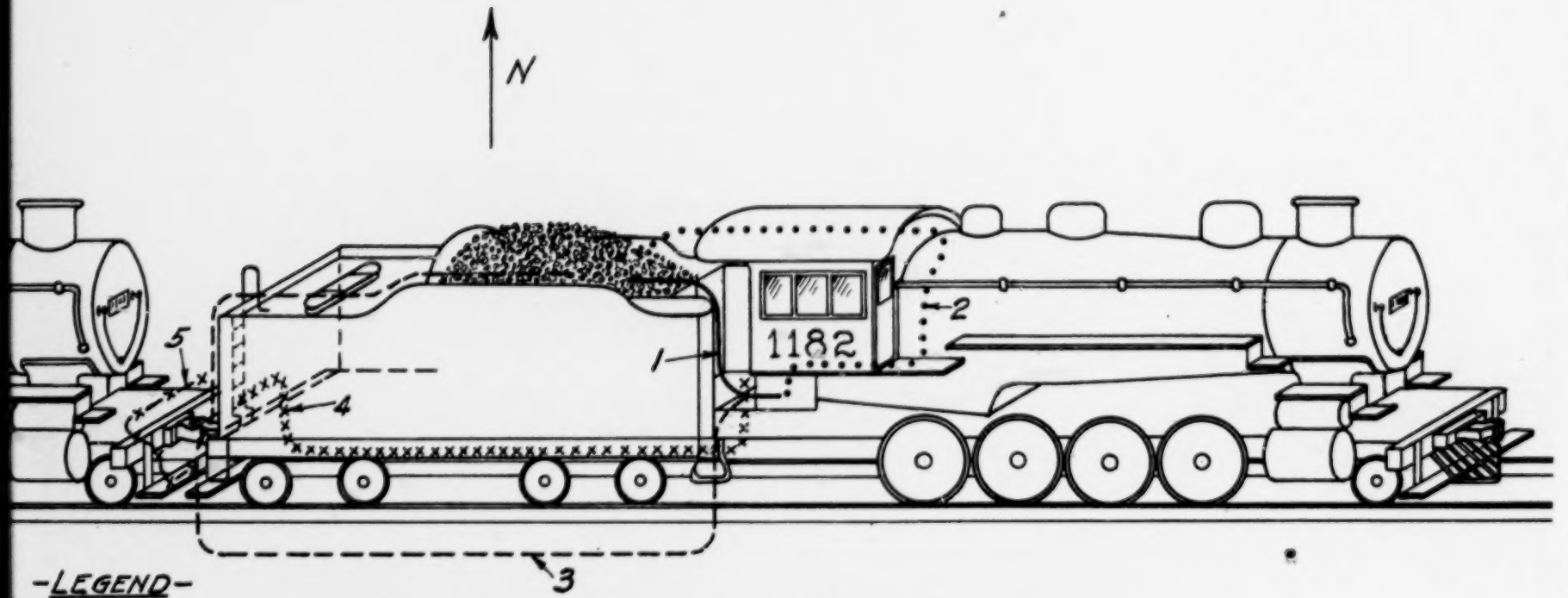
Conclusion

It is respectfully submitted that the judgment of the Supreme Court of Utah should be reversed.

P. T. FARNSWORTH, JR.,
W. Q. VAN COTT,
Counsel for Petitioners.

APPENDIX A

Appendix-A



-LEGEND-

——— 1. Straight back from cab, up coal ladder to top of tender.

····· 2. Through front door of cab, over top of cab, to top of tender.

— — — 3. Dismount from cab to ground on engineers side, walk to rear of tender and climb ladder on engineer's side to top of tender.

×××× 4. Dismount from cab to ground on fireman's side walk to rear of tender, climb over the draw bars to engineer's side and climb ladder to top of tender.

—×—× 5. Same as No. 4 except across the pilot platform of No. 1149 instead of over the drawbars.

APPENDIX B

The decision by the Supreme Court of Utah that Bruner, as matter of law, was not guilty of contributory negligence disposed of exceptions taken in the trial court and errors relied on in the Supreme Court as follows: The trial court in Instruction No. 6 told the jury that Bruner had the right to assume that the engines would not be moved without signal; that Bruner had the right to presume that the rules and regulations of the Railroad would not be violated; and that Bruner had the right to act upon such presumption. (R. 10) The railroad excepted to Instruction No. 6 and to each part thereof. (R. 11)

Instruction No. 6 was clearly erroneous in telling the jury that Bruner could assume and presume and act upon such presumption that the engine would not be moved and that rules and regulations would be observed. To hold that Bruner might thus presume and act would absolve Bruner from the duty of exercising due care for his own protection. It violates the fundamental rule applied in every variety of negligence case that plaintiff as well as defendant must exercise due care and is not relieved from that duty merely because it has been disregarded by the other party.

Wilkinson v. *O. S. L. R. Co.*, 35 Utah 110, 99 Pac. 466

Pippy v. *O. S. L. R. Co.*, 79 Utah 439, 11 Pac. (2d) 305

Rockport Coal Co. v. *Barnard*, 210 Ky. 5, 273 S. W. 533

McPherson v. *Walling*, 53 Cal. App. 563, 209 Pac. 209

Roller v. *Daleys, Inc.*, 219 Cal. 542, 28 Pac. (2d) 345

Hutson v. *So. Cal. Ry. Co.*, 150 Cal. 701, 89 Pac. 1093

Merely because the trial court may have instructed the jury in some other instruction with respect to contributory negligence does not cure the error in this instruction under the decisions of the Supreme Court of Utah.

Sorenson v. *Bell*, 51 Utah 262, 170 Pac. 72
State v. *Waid*, 92 Utah 297, 67 Pac. (2d) 647
Konold v. *R. G. W. Ry. Co.*, 21 Utah 379, 60 Pac. 1021

On appeal to the Supreme Court of Utah the Railroad, in paragraphs 1, 2 and 3 of its Statement of Errors Relied On, (R. 133) contended that prejudicial error was committed in the giving of such instruction.

The Supreme Court of Utah avoided the error thus disclosed by holding that under the evidence as matter of law Bruner was not guilty of contributory negligence. (R. 106, 107)

In paragraph I of the Petition for Rehearing (R. 135) the Railroad contended that the Supreme Court of Utah erred in so holding.

In Instructions Nos. 9 and 20 (R. 11, 12) the court instructed the jury that if it found in favor of Bruner on the issue of liability "he would be *entitled to receive* as compensation for such loss and impairment of future earning power, the value or equivalent of said loss and impairment of future earning power if paid now in a lump sum," etc. This mandate to the jury was unconditional. The jury could not obey that mandate and also make any deduction for contributory negligence, however gross such contributory negligence may have been.

Even were it not well settled in Utah as elsewhere that an erroneous instruction on a material point cannot be cured by

another contradictory instruction, this charge of the trial court would constitute reversible error. This is true because a statement elsewhere in the instructions that a deduction should be made from the aggregate amount of damages suffered by plaintiff for any contributory negligence on his part, does not negative the unconditional direction that plaintiff must "receive" the full present value of one element of his damage, to wit, "loss and impairment of future earning power."

In *Sorenson et al.* v. *Bell*, 51 Utah 262, 170 Pac. 72, the trial court gave conflicting instructions relative to the burden of proof with respect to contributory negligence. In reversing the judgment of that court because of such error, the Utah Supreme Court says at pages 265-6 of the Utah report:

> True, counsel point to other portions of the charge wherein, they contend, the rule respecting the burden of proof is correctly stated. If that be conceded, it still does not minimize, much less cure, the palpable error contained in the foregoing instruction. At most it would merely present a case where two instructions were given upon the same subject, one proper and the other improper. Where such is the case, and the evidence is conflicting upon the subject covered by the instructions, or is such that more than one conclusion is permissible, and the record leaves it in doubt whether the jury followed the instruction that is proper or the one that is improper, then but one result is legally permissible in this court, and that is to reverse the judgment and grant a new trial to the aggrieved party. The district court no doubt had in mind correct principles of law when it framed the instruction, but in stating those principles it used language which cast a burden on plaintiffs which the law does not require of them. The instruction is therefore clearly erroneous.

In *State* v. *Waid*, 92 Utah 297, 67 Pac. (2d) 647, the Su-

preme Court of Utah quotes its language in *Sorenson* v. *Bell*, at page 307 of the Utah report and then continues on page 307 as follows:

> "Instructions on a material point in the case which are inconsistent or contradictory should not be given. The giving of such instructions is error, and a sufficient ground of reversal, because it is impossible, after verdict, to ascertain which instruction the jury followed, or what influence the erroneous instruction had in their deliberation. This has been so uniformly held that citations are unnecessary."

Accord: *Konold* v. *R. G. W. Ry. Co.*, 21 Utah 379, 60 Pac. 1021.

The Railroad excepted to Instructions 9 and 20 and each part thereof. (R. 12, 13) On appeal to the Supreme Court of Utah the Railroad in paragraphs 4, 5, 6 and 7 of its Statement of Errors Relied On contended that prejudicial error was committed in giving Instructions 9 and 20. (R. 133, 134) The Supreme Court of Utah avoided the error thus disclosed by holding that under the evidence as matter of law Bruner was not guilty of contributory negligence. (R. 106, 107) In paragraph 1 of the Petition for Rehearing the Railroad contended that the Supreme Court of Utah erred in so holding. (R. 135)

APPENDIX C

The decision by the Supreme Court of Utah that the Railroad was guilty of negligence as matter of law disposed of exceptions taken in the trial court and errors relied on in the Supreme Court as follows:

In Instruction No. 6 (R. 10) the court told the jury that Bruner had the right to presume *and act upon the presumption* that Colosimo (Bruner's boss) would obey and not violate any

of the rules and regulations of the Railroad Company pertaining to the movement of its trains and engines and the safety of its employees in force at the time. The two rules pleaded and before the court were Rule 2057 as follows:

> Engine bell or whistle warning must be given before engines are moved, then wait at least one minute. (R. 5)

and Rule 30 as follows:

> The bell must be rung when an engine is about to move and while approaching and passing stations, tunnels, snow sheds and public crossing at grade. (R. 4)

The Railroad excepted to such portion of Instruction No. 6 (R. 11). Instruction No. 6 was erroneous for two reasons: *first*, the two rules were not applicable to yard movements; *second*, it told the jury that a disregard of those rules constituted negligence per se whereas the existence of the rules should at most only have been submitted to the jury as one circumstance for its consideration.

On appeal to the Supreme Court of Utah the Railroad, in paragraphs 1, 2 and 3 of its Statements of Errors Relied On (R. 133), contended that prejudicial error was committed in the giving of that instruction.

The Supreme Court of Utah avoided the error thus disclosed by holding that the evidence of negligence on the part of the Railroad was such that the Court could have directed a verdict in favor of Bruner and it was not prejudicial error for the Court to give the instruction on these rules even though the rules were inapplicable. (R. 110)

In paragraph II of the Petition for Rehearing (R. 135) the Railroad contended that the Supreme Court of Utah erred in so holding.

APPENDIX D

Instruction No. 6 (R. 10) *erroneously assumes as matter of law that Bruner at the time of accident was within the protection of the rules as to signals before moving engines.*

That assumption disregards the evidence that Bruner could have reached the top of the tender of 1182 by using facilities designed for the purpose, entirely suitable and safe, but chose one that was entirely unsuitable, unsafe and not designed for the purpose of being climbed over. Safety rules promulgated by the master are applicable only to those within the class of persons for whose protection the rule was adopted.

Thus in *Hartung* v. *Union Pacific R. Co.*, 35 Wyo. 188, 247 Pac. 1071, a suit for death under the Federal Employers' Liability Act, decedent was sent to back flag and was struck and killed by the train which he was supposed to stop. Plaintiff claimed defendant was negligent in that the rear lights of his train were green instead of red as required by the rule. It was held that decedent was not within the class of persons for whose protection the rule was adopted.

In *Sears* v. *Texas & N. O. Ry. Co.*, 247 S. W. 602, a brakeman sent to back flag went to sleep by or on the track and was killed by the train which he should have stopped. Plaintiff claimed the protection of a rule requiring that train to stop when a red lantern is placed on or near the track. On page 608 the court said:

> * * * However, if it be conceded that the red lantern was placed by Sears in the proper place to give warning of danger to the engineer, it must be further conceded that it was so placed to warn those in charge of an approaching train of danger to said train and its passengers and of the danger to trains ahead. It certainly was not intended to be, nor was it in fact, even

a remote warning that the brakeman who set the warning was or could probably be asleep on the track or so near thereto as to be struck by the engine; no such danger could have been reasonably anticipated by the engineer had he seen the warning signal. As already stated, an injury is not actionable if it could not have been foreseen or reasonably anticipated.

In the same case, before the Commission of Appeals, 266 S. W. 400, that court on page 407 said:

> Like the omission of any other precaution required at common law, or even by statute (as in the case of crossing signals, Norfolk, etc. Co. v. Gesswine, 144 F. 59, 75 C. C. A. 214) the disobedience of a rule is only negligence towards those who have a right for the protection of which a duty arises. And, as has been seen, the deceased in this case was not in the latter position. In addition, a failure of compliance with the rule was not as to him the proximate cause of his death, because a person in his situation could not have been "reasonably anticipated."

Accord: *Ellis' Adm'r* v. *Louisville, H. & St. L. Ry. Co.*, 155 Ky. 745, 160 S. W. 512.

The Supreme Court of Utah has recognized the same principle in *Humphreys* v. *Davis*, 61 Utah 592, 217 Pac. 693. There a cinder pit employe took a position on skeleton tracks over the pit. On page 694 the court said:

> The track in question was not designed to stand or walk upon. No person could reasonably be expected to be upon it.

So in this case. The rear end of the tender of 1182 is not designed for passage of employees from one side to the other. Exhibit 3 (R. 62A, introduced in evidence at R. 62) demonstrates this. The difference in height between the steps and

the top of the draw bar and coupler makes passage awkward and difficult. The handhold is too low with reference to the top of the draw bar for such undesigned use. If Bruner had laid down on the track and been run over by the movement of engines he would as matter of law not have been within the class of persons for whose protection the rules in regard to signals were adopted. But his conduct, it is submitted, was outrageously negligent. He had many designed, suitable and safe ways of reaching the required point. He ignored them and chose a highly dangerous, unsuitable and undesigned way. It is as if an employe whose duty required him to go to the floor below disregarded the staircase and tried to slide down the elevator shaft or a drain pipe.

But we need not go so far as to contend that Bruner's actions placed him outside the protection of the rules as matter of law. We need only point out that it was at least a question for the jury as to whether Bruner's conduct was such as to bring him within or leave him without the protection of the rules.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 41

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION, AND THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION,

Petitioners,

vs.

E. E. BRUNER,

Respondent.

REPLY BRIEF OF PETITIONERS

All italics are added.

REPLY BRIEF ON STATEMENT OF THE CASE

Bruner, at the time he placed himself in the position of danger, knew that movement of the engines was imminent.

On page 2 of his brief Bruner states that the movement of the engines was unexpected. This is unjustified by the

record. Bruner knew that movement of the engines was imminent. He knew that after Colosimo coaled 1149 he would descend to the cab of 1149 and then move both engines so that 1182 could be spotted at the coal apron. That Bruner did so understand is demonstrated by the fact that he was then in the act of climbing up on to the tender for the purpose of getting to the top of the tender to spot 1182 at the coal chute. The engines had to be moved in order to spot 1182. (R. 3, 33, 34, 51, 55.)

At R. 33 Bruner testified:

> Q. You told the jury before you left the cinder pit you knew you were going to take coal on both engines.
>
> A. Yes.
>
> * * * *
>
> Q. Do you recall when the engines stopped there in the vicinity of the coal chute?
>
> A. I figured that he had spotted his engine to take coal. It would be in that vinicity, yes.

At R. 34 Bruner testified:

> A. I went to the rear end of the tank. We have a ladder on the rear end of the tank, to get up on. I went to the rear end of the tank of 1182, in order to get up on the tank, to take coal, to spot for coal and to take coal.

At R. 51 Bruner testified:

> Q. He talked to you about how you would do it, that you would go to the sand house and you would sand this 1182, and then you would move down to the coal yard, and he would coal 1149, and then they would spot 1182, and you would coal 1182?
>
> A. Yes.
>
> Q. Is that correct?
>
> A. Yes.

At R. 55 Bruner testified:

Q. You say there are two aprons at the coal chute?

A. Yes.

Q. But those aprons are not sufficiently far apart so you can coal two locomotives at once?

A. No.

Q. In other words, you get one locomotive in there, and there is no room for another?

A. That is right, there is no room.

Indeed the complaint so alleges. R. 3 reads in part as follows:

> * * * That while coal was being placed in the tender of Engine No. 1149 by the said Colosimo, the plaintiff after checking the water level, steam pressure and fire of said Engine No. 1182, got down from the left hand side of the cab of said engine, went to the rear end of the tender of said engine and proceeded to climb up on the tender of said engine in order to reach a position from which he could by proper signals direct said Colosimo in the movements of said engines, *to the end that the tender of Engine No.* 1182 *could be spotted under the coal chute.*

Bruner both alleged and testified that movement of the engines was imminent at the very moment that he was climbing over the draw bars between the two engines.

Bruner's own testimony shows that, prior to the time when he reached a position on the tender where he would be visible, it was his duty to be on the south side of 1182 *so that his signals to start and stop the engines could be seen by Colosimo.*

On page 9 Bruner contends that there is no evidence that he should have stayed on the south side of the engines. Bruner himself testified at R. 28 as follows:

Q. Where would the helper be?

A. *Wherever his work was to be, he would be*

wherever he had to be to give the signals so they would be seen.

It would only be necessary to see signals when starting or stopping engines. In either event Colosimo would be in the engineer's cab. (R. 65, 73.) That is the south side. (R. 65.) Colosimo could see Bruner if Bruner were on the south side. He obviously could not see him if on the north side, unless on top of the tender. But Bruner was not on top of the tender. He dismounted to the ground on the north side of the engine where he could not be seen from the engineer's cab. (R. 73, Appendix A.)

Also Bruner states that he was to start the engines from the top of 1182. This is incorrect. He could start them from any position visible to the engineer's cab. It was only necessary for Bruner to be on top of 1182 when he spotted it. (R. 44.)

It was not necessarily Bruner's duty to be on top of 1182 *at the time the engines were ready to be moved.*

On page 6 of his brief Bruner says that it was his duty to be on the tender of 1182 when Colosimo *was ready to move;* and that it was Bruner's duty to be on top. The record does not bear out these statements.

It is true that there is evidence that it was Bruner's duty to spot 1182 at the coal chute. (R. 38, 44.) That may mean that Bruner should have been on top of the tender to spot it, but does not necessarily mean that it was Bruner's duty to be on the tender when Colosimo was ready to move. Bruner's evidence at R. 45-46 falls far short of showing that Bruner had to be on top of the tender to give a signal to back the engines. The physical facts demonstrate that he could have

been on the south side of the engines or on the ground to the south of the engines.

Bruner testified that it was his duty to be wherever he had to be to give signals so they would be seen. (R. 28.) But Colosimo, in the engineer's cab of 1149, could have seen Bruner giving signals if Bruner had been on the ground on the south side of 1182.

If Bruner, while on the ground south of the engines or on the south side of the engines, had given a signal to Colosimo to move westerly, he could have climbed to the top of the tender in time to spot 1182 before it reached the coal spout. Bruner would have to climb only a few steps while Colosimo started the engines and moved them an engine length.

Colosimo did not know that Bruner was not on the tender of 1182 *when the engines were started.*

On page 10, Bruner asserts that Colosimo, at the time he started the engines, knew that Bruner was not on the tender of 1182. This is contrary to the uncontradicted evidence. At R. 100 Colosimo testified that he did not see Bruner from the time Bruner gave him a signal at the sand dome, which was before the engines were moved to the coal chute, until after the accident. Colosimo expressly testified that he did not know where Bruner was, that he did not see Bruner but thought that Bruner was on top of the tender. (R. 100.)

The Railroad has always contended that the rules relied on by Bruner were inapplicable; the Supreme Court of Utah said it was doubtful; and there was evidence which would justify a finding that the rules respecting signals had been supplanted by specific instructions by Colosimo and acquiescence therein by Bruner, that Bruner was to stay on engine 1182 *until Colosimo had spotted it for coaling.*

On page 3 of his brief Bruner says there was no evidence or contention that the rules with respect to giving signals before starting engines did not apply to the movement of engines at the time of the accident. There has been a contention throughout this case that the rules were inapplicable. Indeed, the Supreme Court of Utah said that there was considerable doubt whether the rules were applicable. (R. 108.)

That statement is also inconsistent with the evidence that Colosimo was the boss (R. 27, 91), that Bruner understood he was to do what Colosimo told him (R. 27), that Colosimo told Bruner to stay on the engine (R. 81, 102), and that Bruner knew that movement of the engines was imminent (R. 3, 33, 34, 51, 55).

The regular way to coal engines was for Bruner, as hostler's helper, to coal both of them. (R. 45, 50.) That would have required Bruner first to spot 1149; then for Bruner to coal 1149; then for Bruner to dismount from the tender of 1149 and ascend to the top of the tender of 1182; then for Colosimo to move both engines westerly until 1182 was in position to receive coal; and then for Bruner to coal 1182. Colosimo ordered that the usual and customary method be departed from and that he would spot and coal 1149 and that Bruner would coal 1182. (R. 31, 45.)

At R. 45 Bruner testified:

> Q. *What was the custom and practice* where you were coaling two engines, both headed toward the east, where the coal was placed in the west engine first?
>
> A. Outside of where you make the stop where he did, the hostler's helper would be up there to take the coal, but when he had instructed me not to be there, *naturally I was up on the engine that he had told me to take coal on.* Otherwise, if the helper is to take coal he would be back on that engine to take the coal.

> Q. Did you have any instructions with reference to the engine you were to take coal on?
>
> A. He told me I was to take coal on Engine 1182, and he would take coal on Engine 1149, and he instructed me to take coal on 1182.

Colosimo testified in two places that as part of the same instructions, he told Bruner to stay on engine 1182 (R. 41, 102). Great emphasis is laid on the evidence elicited from Colosimo on cross examination that Colosimo meant merely that he would take care of 1149 and Bruner would take care of 1182. (R. 102.) The question asked was double.

> Q. (By Mr. Black) All you meant by that was that you would take care of 1149, and Bruner would take care of 1182?
>
> A. Yes sir.

Both parts of the question were true. Both parts could be truthfully answered in the affirmative. A technically minded witness might have analyzed the question and noted the introductory phrase, "All you meant by that." Colosimo didn't do so. Of course, what Colosimo meant was immaterial. Also, what Colosimo said he meant was not binding on the Railroad. The question was what a reasonable man would understand from spoken words. It is submitted that the jury could have found that a reasonable man could understand that Bruner was instructed to stay on 1182 until 1182 was spotted for coaling.

On page 5 of his brief Bruner says that all of Colosimo's evidence with respect to his instructions to stay on 1182 is as set forth on page 5. This is incorrect. At R. 81 appears the following:

> A. Yes, I believe so. I told him for him to sand 1182 and stay on her and coal her, and at the same time I would take care of the 1149.

This answer was considerably different from the answer as to which Mr. Black secured the favorable answer at R. 102. The latter read:

> A. I just told him to stay on the 1182. That is what I told him, just to stay on the 1182, and I would take care of the 1149.

Colosimo answered the double question by saying that all he meant by that answer at R. 102 was that Colosimo would take care of 1149 and Bruner would take care of 1182, in spite of the fact that such was far from the natural meaning of Colosimo's answer. It is to be noted, however, that the answer at R. 81 contains elements in addition to those contained in the answer at R. 102, to wit: that Colosimo told Bruner to sand 1182 and to coal 1182. Colosimo at R. 81 testified he told Bruner not only to coal 1182 but also to stay on 1182. Certainly the effect of the evidence at R. 81 was not dissipated by the cross examination at R. 102. Indeed Br. Black did not ask Colosimo what he meant by the evidence given at R. 81.

The record does not justify the statement that it was the usual, customary and proper way to climb over the wooden beam and cross over the coupler of 1182.

On page 8 of his brief Bruner states that the usual, customary and proper way to get to the top of the tender of 1182 was to climb on to the wooden beam at the rear of the tender of 1182 and thus cross over the coupler to get to the ladder. At R. 75-76 Bruner did testify that he had had occasion to, that he had done so many times, and that it was common practice. But he was pressed further by his counsel by the question:

"Q. There is no effort at all?"

and answered:

"A. I have had occasion to."

On pages 12-20 of their original brief petitioners have discussed the situation, the various ways of getting from the cab to the top of the tender of 1182, and the fact that the way chosen by Bruner was awkward and dangerous. The physical facts demonstrate this. It seems ridiculous to assert that it was usual, customary and proper. Evidence to that effect by a party in interest should be entitled to little if any weight. Certainly it cannot establish it as matter of law.

On pages 8 and 9 Bruner points to evidence that he could climb to the top of 1182 as he saw fit. True Bruner and Colosimo so testified. Such evidence, however, cannot prevail against the well settled principle of the law of Master and Servant that the servant's choice of ways must be reasonable, not outrageous.

The record does not show that the Railroad's Request for Instruction No. 5 was given.

On page 11 Bruner states that the Railroad's requested Instruction No. 5 was given. The record does not show it. It is true that the request is endorsed "Given." It is true that the Railroad did not except to a refusal to give it. It may, as suggested by Mr. Justice Larson, have been misled by such endorsement. (R. 116.)

At R. 116 Mr. Justice Larson states:

> * * * This requested instruction appears in the file, endorsed by the judge as "Given," *but it is not found in form or substance in the charge as read to the jury.* No exception to the failure of the court to give this Request No. 5 was taken, perhaps because when the court endorsed the request as "given," counsel assumed the court had given it.

This shows that such an instruction was not read to the jury. Moreover, it is not in the printed record before this court

although the parties stipulated that the entire charge, except the first paragraph which described the pleadings, be certified up. (R. 137.)

REPLY BRIEF ON BRUNER'S POINT I

This court will not disregard errors by State Supreme Courts unless convinced that they are harmless.

In *Yazoo & M. V. R. Co.* v. *Mullins*, cited by respondent on page 15, the court said on page 533:

> But we cannot say here that the rights of the Railroad were not prejudiced by the error of the Supreme Court of Mississippi. * * * *As examination of of this record does not convince us that the admitted error was harmless*, the judgment of the Supreme Court of Mississippi is reversed.

On page 15 Bruner states that the judgment in the above case was reversed because of clear error in an instruction. As will be noted from the above excerpt it was reversed because the court *was not convinced* that error by the Supreme Court of the State was not prejudicial.

It is difficult to see how this court can be convinced that the errors of the Supreme Court of Utah were not prejudicial.

If Instructions 6, 9 and 20 were not regarded by the Supreme Court of Utah as prejudicially erroneous, that court could most easily have disposed of the asserted errors by so stating. The fact that it did not thus dispose of the instructions, but chose the more arduous burden of examining the record and reaching a conclusion that Bruner was not guilty of contributory negligence as matter of law and that the defendants were guilty of negligence as matter of law, seems to justify the inference that the Supreme Court of Utah had grave doubts as to the instructions or thought that they were preju-,

dicially erroneous. This is particularly true in view of two dissents on the very subject of whether there was evidence of contributory negligence and whether the Railroad was guilty of negligence as matter of law.

If the Supreme Court of Utah has erred in concluding that Bruner was as matter of law not guilty of contributory negligence and that the Railroad was as matter of law guilty of negligence, it has been misled by such errors into refusing to review and hold erroneous Instructions Nos. 6, 9 and 20.

This Court would usually take the view that Error or Lack of Error in Instructions such as Nos. 6, 9 and 20 are State questions which it will not review.

In *Yazoo and M. V. R. Co.* v. *Mullins* this court on page 533 said:

> * * * Whether the case comes from a state court or a federal court, this court will, for the purpose of determining whether the error found may have been prejudicial, examine the whole record; *state questions being left to the decision of the state court in cases coming here from those courts.*

In addition to the Federal Courts there are forty-eight State courts administering the Federal Employers' Liability Act. They all have their statutes, rules and decisions respecting instructions to juries, errors therein, prejudice thereby, exceptions thereto and review thereof. Those rules are applicable not merely to Federal Employers' Liability Act cases. If it clearly appears that the practice in a certain State is such that the rights of a party under the Federal Employers' Liability Act are not protected, this court would review and reverse such practice.

Garrett v. *Moore-McCormack Co.*, 317 U. S. 239, 87 L. Ed. 239, 63 S. Ct. 246

Lisenba v. *People of State of California*, 314 U. S. 219, 86 L. Ed. 166, 62 S. Ct. 280

If a State Supreme Court approved instructions to a jury which *avowedly* placed the burden of negativing contributory negligence on plaintiff or denied to defendants mitigation of damages on account of contributory negligence, this court would be likely to review and reverse. Suppose, however, that an instruction recognizes the correct principles of law but contains an element, which according to the decisions of the Supreme Court of State A constitutes prejudicial error, but according to the decisions of the Supreme Court of State B does not, will this court undertake to harmonize and reconcile such decisions by State Supreme Courts? It would seem an impossible task. It is a problem of judicial administration inherent in the Federal Employers' Liability Act being administered in State courts. Usually the court refuses to review such questions and says they are State questions.

L. & N. R. R. Co. v. *Holloway*, 246 U. S. 525, 62 L. Ed. 867, 38 S. Ct. 379

This conforms to the general rule that State courts follow their own rules of practice and procedure under the Federal Employers' Liability Act, and that this court does not interest itself unless matters nominally of procedure, are actually matters of substance which affect the Federal right.

Lee v. *Central of Georgia Railway Co.*, 252 U. S. 109, 64 L. Ed. 482, 40 S. Ct. 254

Minneapolis & St. Louis R. Co. v. *Bombolis*, 241 U. S. 211, 60 L. Ed. 961, 36 S. Ct. 595

And this, no doubt, would be true even though this court might consider that the practice in one State was better calculated properly and justly to administer the act than that of some other State.

If a State court recognizes correct principles of law under the Federal Employers' Liability Act but nevertheless instructs

the jury erroneously, the prejudiced party may always urge logically that his rights under the Act have not been protected. Thus in the case at bar, the Railroad contends that although the trial court gave Instruction No. 15 (R. 117) which told the jury that contributory negligence diminished damages proportionately, also gave Instruction No. 6 which was inconsistent with No. 15, and that, under the decisions of the Supreme Court of Utah, that is prejudicial error. If the Supreme Court of Utah had reviewed those errors, and held the errors were non-erroneous or not prejudicially erroneous, we suggest that this court would probably regard that as a state question and decline to review it.

This court, we presume, was willing to review this case, not because of the question of whether or not the instructions were erroneous, but because the Supreme Court of Utah refused to decide whether they were erroneous on the ground that there was no evidence to be submitted to the jury on the issues as to which the instructions under attack were given. Thus the State court held that the Railroad should not be accorded review of its contention that it was not accorded a fair trial of those issues, because it was not entitled to any jury trial of such issues. On page 12 Bruner calls this assertion "extravagant and misleading." It is submitted that it is based on the realities of the situation.

The ruling contended for by Bruner, that this court should avoid the question of whether the State Supreme Court erred in holding that the Railroad was as matter of law negligent and that Bruner was as matter of law not negligent by examining the instructions, would in many cases leave a litigant such as the Railroad in this case without remedy. Its case would fall between a State Court, which refuses to consider whether an instruction is erroneous because it considers that

there is no evidence on a certain issue to be submitted to a jury, and this Court, which regards the question as to whether the instructions under attack are erroneous or prejudicially erroneous as one for the State court.

REPLY BRIEF ON BRUNER'S POINT II

(a) *Reply brief regarding Instruction No. 6.*

There seems to be no substantial difference between the parties as to the meaning of Instruction No. 6. On page 35 of its original brief the Railroad described the effect of the instruction thus:

> Instruction No. 6 was clearly erroneous in telling the jury that Bruner could assume and presume and act upon such presumption that the engine would not be moved and that rules and regulations would be observed. To hold that Bruner might thus presume and act would absolve Bruner from the duty of exercising due care for his own protection. *It violates the fundamental rule* applied in every variety of negligence case *that plaintiff as well as defendant must exercise due care* and is not relieved from that duty merely because it has been disregarded by the other party.

On page 23 of his brief Bruner describes the effect as follows:

> * * * The instruction told the jury that, *as matter of law*, Respondent had a right to rely upon obedience to these standards. * * * The instruction merely states that in making the attempt to pass over the couplers and up the ladder to the top of 1182, *it was not necessary for Respondent to take precautionary measures to guard himself from danger* which could arise only as the result of Colosimo's failure to obey the rules, regulations and customs.

On page 23 Bruner contends that decisions from State and Federal courts under the Federal Employers Liability

Act "unanimously support the proposition that employees are entitled to rely upon rules and customs which determine the standard of what they must anticipate in the performance of their duties and that they are entitled to act in reliance thereon."

The cases cited do not support the contention. The first case cited, *Tennant* v. *Peoria & P. U. Ry. Co.*, decided by this court in January, 1944, is typical of many of the other cases cited and brings out the underlying fallacy of Bruner's contention. In discussing the rule and custom of ringing a bell when an engine is about to move, this court said:

> * * * In addition, the evidence relating to the rule and custom of ringing a bell "when an engine is about to move" *warranted a finding that Tennant was entitled to rely* on such a warning under these circumstances. The ultimate inference that Tennant would not have been killed but for the failure to warn him is therefore supportable. The ringing of the bell might well have saved his life. *The jury could thus find* that respondent was liable "for * * * death resulting in whole or in part from the negligence of any of the * * * employees."

This court thus held that the evidence of the rule and custom justified a finding that the employee was entitled to rely on the warning. It did not hold that Tennant could for that reason fail to exercise reasonable care for his own protection. Nor did this court hold that Tennant had the right, as matter of law, to assume and presume and act upon the presumption that a bell would be rung. It did not hold that the trial court could properly instruct the jury that Tennant would not be guilty of contributory negligence in wholly failing to exercise reasonable care for his own protection. On the

contrary this court said that all such circumstances were for the jury. On page 412 the court said:

> * * * It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.

In the second case cited, *Kurn* v. *Stanfield*, decided by the Eighth Circuit Court of Appeals in May, 1940, the plaintiff pleaded that there was a rule and custom not to start trains except on proper signal. This was admitted by the railroad. There was no issue to to that. A motion for a directed verdict was denied and a verdict for the plaintiff resulted. The railroad contended that the trainman was guilty as a matter of law failing to anticipate that the train would come upon him wihout warning. The Eighth Circuit Court of Appeals held that the employee was not as matter of law bound so to anticipate. On page 473 the court said:

> * * * Stanfield had not given the necessary signal which was the condition precedent without which his train should not have proceeded *and he was not as a matter of law bound to anticipate that it would come down upon him suddenly and without warning.*

And on page 474:

> * * * We think the evidence here required the submission to the jury and a verdict in Stanfield's favor was fully justified.

Here again it is to be noted that the court did not hold that the jury should have been instructed as matter of law that the employee would not be guilty of contributory negligence in acting upon the assumption that the rule and custom would be adhered to.

It would unduly prolong this reply brief to analyze in detail the other sixteen cases cited by Bruner for this contention. Suffice it to say that none of them holds that a plaintiff may as matter of law rely wholly on the master to comply with rules and recover regardless of a failure to exercise reasonable care for his own safety.

Many other cases might be added to those cited by Bruner which contain general statements that violations of rules or practices constitute negligence and that one has a right to "assume" that another will not be negligent and "rely" on others being careful. Under the peculiar facts in many cases, courts have held, and correctly held, that plaintiffs had the right to assume that rules, practices, city ordinances or statutes, etc., would not be violated and to act on that assumption. No court has ever announced that law and held it to be applicable where plaintiff has actual knowledge of such violation and voluntarily exposes himself to the peril incident thereto; or where plaintiff had knowledge or notice that such violation *might* occur, of such character as would cause a reasonably prudent man under all of the surrounding facts and circumstances to refrain from exposing himself to danger incident to such possible violation; or where different inferences may be drawn from the evidence as to whether a plaintiff in the exercise of reasonable care should have anticipated the possibility of a rule not being complied with by reason of special circumstances such as Colosimo's instructions to Bruner to stay on the engine. In all such cases it is elementary that it is for the jury and not the trial or appellate court to determine the existence or non-existence of contributory negligence.

There is nothing in the Federal Employers' Liability Act or in any decision of this or any court which changes the settled rule on this subject and takes from the jury the power

and duty of interpreting relevant evidence touching such questions or which permits a court to decide them as matter of law. Nor is there any modification of the ancient rule which requires railroad employees as well as other men to exercise ordinary care for their own safety at all times and under all conditions and that the failure so to do constitutes contributory negligence, regardless of the existence of negligence on the part of the defendant. Indeed, discussion of contributory negligence is pertinent only in the presence of negligence of the defendant. The term "contributory negligence" implies and presupposes the existence of negligence of the defendant.

Booth v. *McLean Contracting Co.*, 108 Md. 456, 70 Atl. 104

Dragan v. *Grossman*, 116 N. J. L. 182, 182 Atl. 848

Hummer's Ex'x v. *Louisville & N. R. Co.*, 128 Ky. 486, 108 S. W. 885

Bruner disregards this elementary principle in arguing over and over that Bruner's behavior was not contributory negligence; was not dangerous except for Colosimo's carelessness in moving the engines.

On page 24 Bruner calls to the court's attention cases involving assumption of risk in which it is stated this court has recognized the rights of employees of railroads to rely upon fellow employees exercising ordinary care and following customary methods in the performance of their work. Typical of the group of cases cited is *Chicago R. I. & P. Ry. Co.* v. *Ward*, in which it was held that Ward could not be regarded as having assumed the risk of a fellow employee failing to obey a rule or follow a custom. This, of course, is elementary in the law of assumption of risk. The other cases cited come no closer to supporting the contention of Bruner than does the Ward

case. It is also to be noted that in several of the cases cited in the first paragraph commencing on page 24 of Bruner's brief, statements by courts that plaintiffs could assume that rules and customs would be obeyed were made with relation to the defense of assumption of risk and were based upon the elementary principle that an employee does not assume the risk of violation by a fellow servant of a rule or custom.

(b) *Reply Brief regarding Instructions Nos. 9 and 20.*

On page 29 Bruner relies upon *State* v. *Trimble, Bucher* v. *Equitable Life Assurance Society* and *Barlow* v. *S. L. & U. R. Co.*

They merely announce well recognized principles that instructions must be considered as a whole; that portions of the charge may not be picked out for consideration; and that two instructions on the same subject are not erroneous unless contradictory. None of them upholds instructions such as Nos. 9 and 20, which purport to be all inclusive and which emphatically and repeatedly declare that if Bruner was injured as the result of the Railroad's negligence "he would be entitled to receive" damages which would fully compensate him, without any mention therein of deduction for contributory negligence.

REPLY BRIEF ON BRUNER'S POINT III

On page 31 of Bruner's brief the following statement appears:

> Petitioners have never contended that the issues of negligence and contributory negligence were not submitted to and determined by the jury.

A substantial portion of the Railroad's brief and Bruner's response thereto is devoted to a discussion of the Railroad's contention that it was not, *as matter of law guilty* of actionable

neglicence (negligence which was the proximate cause of the accident), and that Bruner was not, as *matter of law*, free from contributory negligence. Substantial portions of both briefs are devoted to a discussion of the Railroad's contention that the trial court and the Supreme Court of Utah, respectively, committed manifest error in depriving the Railroad of its right to have the jury find the facts under proper instructions and in holding as matter of law, that the Railroad was guilty of actionable negligence and that Bruner was not guilty of contributory negligence.

Bruner's argument on this point is based upon the fundamental fallacy that he cannot be regarded as guilty of contributory negligence because what he did would not have been dangerous except for Colosimo starting the engines without warning. This is fallacious because it is inconsistent with the entire doctrine of contributory negligence which presupposes primary negligence on the part of defendant concurring with contributory negligence on the part of plaintiff both as proximate causes. If either is not negligent or if either negligence is not a proximate cause, there is no room for the doctrine. It would be equally fallacious for the Railroad to argue that Colosimo's acts cannot be regarded as negligent because no damage would have occurred save for Bruner unnecessarily placing himself in a position which would be dangerous if the engines were started. Either contention fails to comprehend the doctrine of contributory negligence.

Thompson Commentaries on the Law of Negligence, Sec. 169 reads as follows:

> Contributory negligence, in a sound juridical sense, is the negligence of the plaintiff, or of the person on account of whose death or injury the action is brought, amounting to a want of ordinary care and proximately contributing to bring about the injury. The clear mod-

> ern doctrine is that, in order to constitute such negligence as will bar a recovery of damages, these two elements must in every case concur: 1. A want of ordinary care on the part of the plaintiff, or where the action is for damages resulting in death, a want of ordinary care on the part of the person killed; 2. A proximate connection between this want of ordinary care and the injury complained of.

This court as early as 1851 stated the law to be that one person being at fault will not dispose with another's using ordinary care for himself.

Williamson v. *Barrett*, 13 Howard 101. At page 109 the court said:

> * * * A man is not at liberty to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he does not use common and ordinary caution to avoid it. *One person being in fault will not dispense with another's using ordinary care for himself.*

Matthews v. *Daly West Mining Co.*, cited by Bruner on page 37 does not hold either that the employer in that case was guilty of negligence as matter of law or that the employee was as matter of law not guilty of contributory negligence. It merely upheld a jury's verdict in favor of the injured employee and held that motions for non-suit and directed verdict were properly denied. It would be an authority against the Railroad in this case only if the Railroad were contending that Bruner was *guilty of contributory negligence* as matter of law. It sheds no light on whether the Utah Supreme Court committed error in holding that Bruner was as matter of law *not guilty of contributory negligence.*

Throughout his brief Bruner contends that it is perfectly safe to cross over draw bars. But in *Lehigh Valley R. Co.* v. *Scanlon*, 259 Fed. 141, the Second C. C. A. upheld the District Court in leaving to the jury the question of whether a railroad was negligent in leaving cars in a position such that an employee, whose duty required him to cross that track, was under the necessity of climbing over the draw bars.

REPLY BRIEF ON BRUNER'S POINT IV

On page 43 Bruner states that the Railroad did not contend in the trial court that the rules pleaded were inapplicable. This is entirely incorrect. The Railroad has so contended throughout this case. Moreover, the Supreme Court of Utah said their applicability was doubtful. It is true that the Railroad admitted the existence of the rules but never their applicability.

On page 43 Bruner, in referring to the Railroad's contention that it could not be said as matter of law that Colosimo should have anticipated that Bruner would dismount from the engine and climb over the draw bars, says:

> "The proposition is entirely moot inasmuch as any question of negligence based on Colosimo's failure to anticipate what Respondent might or might not do was not pleaded by Respondent nor submitted to the jury by the trial court."

On page 44 Bruner says in part:

> "* * * the failure of Colosimo to anticipate the breach of said order, even if one had been given, did not in whole or in part cause the injuries sustained by Respondent and was never relied upon by Respondent, his counsel or the Supreme Court of Utah as a ground of negligence in this case."

Also on page 45 Bruner continues to disclose a curious misunderstanding of the Railroad's argument that the failure to guard against conduct not reasonably to be anticipated is not negligence. This argument is made on pages 29-32 of Petitioner's original brief. It is based on well recognized principles of the law of negligence. It is not at all dependent upon whether a plaintiff pleads it or relies on it. If Colosimo told Bruner to stay on 1182 and it was Bruner's duty to obey and Bruner did not tell Colosimo he was going to dismount, then Colosimo need not have anticipated that Bruner would dismount and any failure to guard against that possibility would not constitute negligence. Bruner's pleading cannot add to or detract from the Railroad's reliance on that principle of law.

Tennant v. *Peoria & Pekin Union R. Co.*, relied on by Bruner on page 47, also held that the issues of negligence and causation should have been submitted to the jury. It does not hold that either issue should have been determined as matter of law.

C. & O. Ry. Co. v. *Proffit*, relied on by Bruner on page 47, merely holds that an employee does not *assume the risk* of being subjected to unusual dangers not normally incident to the employment. The excerpt quoted on pages 47 and 48 was addressed to the defense of assumption of risk.

CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court of Utah should be reversed.

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W. Q. VAN COTT,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 803

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION, AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION,

Petitioners,

vs.

E. E. BRUNER,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

The Petition for Writ of Certiorari Is Insufficient.

While counsel for petitioners are to be commended for the brevity of the petition in this case, nevertheless, the petition is not sufficient. No facts appear from the petition showing "the matter involved." The general statement that questions of negligence and contributory negligence are involved is insufficient to present the matter to the Court without at least a brief reference to the facts. No

facts appear in the petition and from the petition itself, the Court could not possibly arrive at any conclusion as to what the issues were.

No facts are stated to which any rules of law appear to be held applicable or inapplicable. Without some facts showing how the questions of negligence and contributory negligence arose, the Court could arrive at no conclusion from reading the petition.

Unless this Court read the opinion of the Supreme Court of Utah, it would have no idea as to what issues were involved. The petition is not sufficient to serve its intended purpose.

Record Incomplete — Entire Charge of Court Not Given.

The petition should be denied because of an improper and insufficient Record. On Page 8 of the brief of petitioners in this Court, it is said that the Supreme Court of Utah erred in holding as a matter of law that respondent was not guilty of contributory negligence, and that as a matter of law, petitioners were guilty of negligence.

The Record does not support this contention.

The only instructions of the Court to the jury appearing in the present Record are Instructions Nos. 6, 9, and 20 on Pages 10 to 12, inclusive, and Instructions 15 and 5 on Pages 117 and 118.

On Page 118 of the Record it is specifically stated that the Record on appeal in the lower court did not contain "Defendants' requested Instruction No. 5."

There appears on Page 10 of the Record—"whereupon the court instructs the jury in writing and the case is argued to the jury". Other than the instructions before referred to, what "the instructions in writing" were, does not appear.

Issues of Negligence and Contributory Negligence Were Submitted to the Jury.

On page 8 of the brief of petitioner it is said that the issue of negligence was not submitted to the jury, but that the Supreme Court of Utah held as a matter of law that petitioner was guilty of negligence.

It is true that the Supreme Court of Utah did say that as a matter of law, it appeared that the defendant trustees were guilty of negligence. Nevertheless, the question of negligence was submitted to the jury, as was the question of contributory negligence.

In the decision of the Supreme Court of Utah, (R. 103-104), it is said: "The defendants urge that the jury was not propertly instructed on the issue of contributory negligence. * * * It is contended that the various instructions did not CORRECTLY submit this factor to the jury."

From this it is clear that the question of contributory negligence was submitted as a fact to the jury.

Just how contributory negligence was submitted to the jury does not appear from this Record.

Instruction No. 6 (R. 10-11) deals with the question generally.

Defendants' Requested Instruction No. 15 appears on R. 117-118. This deals with contributory negligence. By this instruction the Court said: "Contributory negligence, however, does operate to reduce the amount which plaintiff would be entitled to recover, if you find that he is entitled to recover anything."

Certainly, this is inconsistent with the claim on Page 8 of the petition that contributory negligence was determined as a matter of law.

We are not unmindful of the statement of the Utah Supreme Court that contributory negligence does not appear in the case. However, the issue was submitted to the jury by Instruction 15.

Also, on Page 118, Defendants' Requested Instruction No. 5 appears. By this instruction it is said, "Contributory negligence is the failure of a person to exercise care under the circumstances for his own safety." Following this Instruction appear the words "Given George A. Faust, Judge". (R. 118)

Under this same Page 118 it appears that the Record in the Court below did not contain this Instruction No. 5.

This, however, cannot avail the petitioners here anything.

Petitioners cannot ask the Supreme Court of the United States to grant certiorari upon an incomplete or a jumbled Record.

The Supreme Court of Utah did not hold as a matter of law that Bruner was not guilty of contributory negligence.

What the Supreme Court did say was—"We must conclude that the Record does not show contributory negligence." (R. 107)

The Court also said there was no evidence to show that the method of doing the work by Bruner was dangerous. (R. 106-107)

The effect of the decision of the Supreme Court of Utah is merely to say that contributory negligence did not appear as a matter of law from the whole record before it.

That contributory negligence was submitted to the jury appears from the statement, (R. 103-104), by Mr. Chief Justice Wolfe to the effect that the defendants contended that the issue of contributory negligence was not PROPERLY submitted to the jury.

Without the Record and without the instructions showing how it was submitted, petitioners are without standing in this Court on the question of contributory negligence.

This leaves the remaining question of whether the defendant trustees were guilty of negligence as a matter of law.

Here, again, the Record is silent. The trial Court submitted the issue of negligence to the jury.

Instruction No. 6 (R. 10 and 11) might be taken to bear on both negligence and contributory negligence.

In Instruction No. 20 (R. 12) the jury was told—"If you find the plaintiff is entitled to recover, you may award him such damages", etc. While the Record is meager, it shows that the issue of negligence or the right to recover was submitted to the jury.

But here, again, on this petition for Writ of Certiorari the Supreme Court of the United States cannot be expected to act in view of the condition of the record and without showing what instructions were in fact given to the jury.

That the question of negligence was submitted to the jury again appears in that portion of Instruction No. 15 on page 117. While that instruction starts out dealing with contributory negligence, it does contain this language: "If under the instructions given you, YOU find that the defendants were negligent and that such negligence was the proximate cause of the injury", etc., clearly it cannot be said in view of this instruction that the jury were not permitted to pass on the question of negligence.

It appears from the decision of the lower court at R. 112 that the trial Court read a portion of the Federal Employers' Liability Act to the jury, being that portion relating to the right to recover for "negligence".

It appears from the opinion at R. 112 that the defendant trustees complained about the charge in that they "were charged with negligence in failing to keep their equipment and road bed in proper condition."

The Court said this was not so. But, the point is that the question of negligence was submitted to the jury.

If it was not submitted properly, the petitioners should have complained at the time, but certainly they cannot now properly come before the Supreme Court of the United States on a Record which does not show what the charge to the jury was, and ask upon the uncertain and incomplete Record, that the Supreme Court grant certiorari.

It appears from the opinion R. 113, that there was an instruction to the jury on negligence in which the jury was told in substance that their conception of negligence under the state law should not govern "because this case was governed by Federal law rather than state law."

What has just been said certainly negatives the idea that the issue of negligence was not submitted to the jury but was found by the Court in this case as a matter of law.

There is a great difference between the Supreme Court of Utah saying that negligence appeared as a matter of law and the trial Court so charging the jury.

It does appear in this case that Petitioners were negligent and Respondent was not. However, Petitioners got all that they were entitled to in the lower court.

The issue of negligence was submitted to the jury. The finding was against them.

The issue of contributory negligence was submitted to the jury; the finding was against them.

In each instance the trial Court upheld the finding of the jury. The Supreme Court of Utah upheld the jury and the lower court.

With such an incomplete Record and with the Record silent as to just how the issues of negligence and contributory negligence were submitted to the jury, we submit that the petition on this ground alone should be denied.

The Petition for Writ should likewise be denied for lack of merit.

Statement of the Case.

This is an ordinary action to recover damages for personal injuries suffered by an employee of the petitioners herein. The action was brought under the Federal Employers' Liability Act, 45 USCA, Sections 51-59; 35 Stat. 65 as amended; 36 Stat. 291 and 53 Stat. 1404.

The provisions of said act were properly applied by the Supreme Court of the State of Utah and its decision herein is not inconsistent with the applicable decisions of the Supreme Court of the United States.

No new question was decided by the Supreme Court of Utah, and its decision does not constitute an extreme or an unusual precedent.

The petition for writ of certiorari is insufficient and should be denied. There is nothing involved herein which necessitates a review by this Court.

Respondent, the plaintiff below, brought suit under said act to recover damages for the loss of a leg below the knee. He alleged that his injury was caused by the negligence of one, Colosimo, a hostler in the employ of the petitioners, in placing two locomotives coupled in motion without receiving from respondent the customary signal, and without

giving warning of the movement by bell or whistle, as a result whereof respondent was thrown upon the tracks beneath the rolling wheels of one of said engines and his left leg was run over and cut off a short distance below the knee.

The trial court submitted the case to the jury under the doctrine of comparative negligence, although there was no evidence of plaintiff's contributory negligence. The jury returned a verdict awarding damages to respondent in the amount of $30,000.00, without reduction on account of contributory negligence. A motion for a new trial was made by petitioners and by the trial Court denied. On appeal to the Supreme Court of Utah judgment on this verdict was affirmed.

Petitioners there contended that the safety rules set forth in plaintiff's complaint (R. 4-5) were not applicable to the circumstances of the case and that the question of contributory negligence had been improperly presented to the jury. The Court held these contentions to be immaterial because, without regard to the safety rules, the undisputed evidence disclosed, as matter of law, that the petitioners were negligent and that respondent was not guilty of contributory negligence.

Petitioners argue that this holding, in effect, denied them the benefits of trial by jury and is inconsistent with decisions of this Court. Wherein said holding is inconsistent with any of the decisions of this Court, cited by petitioners, is not indicated. In the latest of these cases (*Brady* v. *Southern Railroad Company*, 64 S. Ct. 232, 88 Law. Ed. Adv. Op. 189, decided December 20, 1943) this Court upheld a decision of the Supreme Court of the State of North Carolina wherein that Court held, as a matter of law, that no negligence on the part of defendant was shown and that hence the trial Court erred in submitting the case to a jury.

The Court stated at 88 Law Ed. Adv. Op. 192:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the Court should determine the proceeding by non suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury or by judgment notwithstanding the verdict."

And as pointed out by petitioners (petition and brief, page 2) "the rule must work both ways."

The evidence in the case at bar was not in conflict and the Supreme Court of Utah determined that, as matter of law, the petitioners were liable and that respondent was free from contributory negligence, and hence the assigned errors in regard to safety rules and instructions on contributory negligence could not have been prejudicial to the petitioners.

This ruling does not require or involve a construction of the Federal Employers' Liability Act, but merely an appraisal of the evidence to determine whether negligence or contributory negligence was present in the case. The power of appellate Courts to make such an appraisal is well established in our jurisprudence.

This Court in *Union Pacific Ry Co.* v. *McDonald*, 152 U. S. 262, 36 L. Ed. 434, 14 S. Ct. 619 (1893) stated:

> "Nor did the Court err in saying to the jury that the disputed issue was the question of damages. Looking at all the facts there was an entire absence of any just ground for imputing contributory negligence to the plaintiff. If the jury had so found, the Court could properly have set aside the verdict as being against the evidence. Upon the question of negligence, the case is within the rule that the Court may withdraw a case from the jury, altogether and 'direct a verdict for the

> plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such a conclusive character that the Court in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.' Delaware L. & W. R. Co. v. Converse, 139 U. S. 469, 35 L. Ed. 213, and authorities there cited; Elliott v. Chicago M. & St. P. R. Co., 150 U. S. 245, 37 L. Ed. 1068; Anderson County Comrs. v. Beal, 113 U. S. 227, 28 L. Ed. 966."

See also *Baltimore & P. R. Co.* v. *Mackey*, 157 U. S. 72, 39 L. Ed. 624, wherein this Court found that as a matter of law there was no contributory negligence in order to avoid the effect of a claimed erroneous instruction on that subject, and *Choctaw O. & G. R. Co.* v. *Holloway*, 191 U. S. 334, 48 L. Ed. 207, 24 S. Ct. 102, wherein this Court decided that the defendant was guilty of negligence as a matter of law in order to avoid the effect of a claimed erroneous instruction on that subject.

Under the foregoing we believe it is apparent that this is not such a case as comes within the rules laid down by this Court for the granting of petitions for writ of certiorari.

However, we sincerely submit that the Supreme Court of Utah correctly decided this case on its merits and that in view of the undisputed facts the petitioners were guilty of negligence and respondent was free from contributory negligence as matter of law.

Argument.

The Supreme Court of the State of Utah correctly held (1) that respondent was not guilty of contributory negligence; and (2) that the petitioners were guilty of negligence as matter of law.

The Respondent Was Not Guilty of Contributory Negligence.

During the shift when respondent was injured he, as hostler's helper, and Colosimo, as hostler, had been working together (R. 27) in delivering and servicing engines assigned to road duty and recovering incoming engines. The track on which respondent was injured ran east and west. (R. 29) As this track extends west from the round house it reaches the cinder pits first, then the sand house, then the coal chute. (R. 29) It was dark at night when the accident occured. (R. 33)

Engine 1149 was at the cinder pits when Engine 1182 was brought from the roundhouse and coupled onto it. Both engines were facing east. (R. 31) The fire was cleaned on Engine 1182 at the pits. (R. 31) During this operation respondent and Colosimo discussed the movements to be made by the engines. (R. 31) Colosimo told respondent to sand and coal 1182 and that he would coal 1149. (R. 31) Respondent then took a position on the running board of 1182 and when the fire cleaning operation was completed, he, with lighted latern, gave Colosimo, who was in the cab of 1149, a back up signal. (R. 32) Colosimo thereupon sounded the whistle on the 1149 to indicate that he had received the signal (R. 82, 63) and then started the engines backward, and when the 1182 reached a position where sand could be placed in the sand dome, respondent gave the stop signal with his lantern and Colosimo brought the engines to a stop. (R. 32) When the sanding operation was completed respondent again gave the back up signal (R. 33) and Colosimo thereupon backed the engines westward (R. 33) and stopped them when the 1149 reached a point where its tender was beneath the coal chute. (R. 33) After he, Colosimo, had placed coal in the tender of 1149 he started the engines backward, without receiving a signal from respondent and without ascertaining where respondent was,

and without giving any warning signal by bell, whistle, or otherwise.

After the completion of the sanding operation, respondent went back into the cab of 1182 and checked the fire and water and shut off the blower. (R. 33) He then got off the engine on the north side and proceeded back to the rear of the tender. He stepped upon the left rear foot board and took hold of the grab iron which extends horizontally across the back of the tender. He intended to pass over the draw bar and climb up the ladder to the top of the tender. (R. 34, 41) As he was in the act of passing over the draw bar, the engines were unexpectedly started with a sudden jerk by Colosimo as aforesaid and he was thrown onto the tracks where his left leg was run over necessitating amputation below the knee. (R. 41, 42)

There was no conflict in this evidence.

The petitioners' contention that respondent was guilty of contributory negligence is based upon their conclusion that of the five possible ways respondent could have used to gain a position on top of the tender of 1182, he chose the only dangerous, awkward and clumsy way.

This argument is basically unsound in that it rests upon the false premise that the way chosen by respondent to gain his position on the top of the tender of 1182 proximately contributed to the cause of his injury, when as a matter of fact this act was not a causitive factor in the occurrence complained of.

Petitioners' argument also ignores the fact that there is an entire absence of proof that the way pursued by respondent was dangerous or unusual or that the other suggested methods were safe. The argument in its final analysis is nothing but counsel's conclusion that there was inherent danger in the way pursued by respondent and complete

safety in the other methods or ways suggested. Each of the five methods was perfectly safe so long as the engines remained still, as they were when respondent started to pass over the draw bar to the ladder. None was safe in the event the engines were moved suddenly and without warning. The danger was borne of the negligent act of Colosimo in starting the engines without signal or warning, it was not kin to the way pursued.

It is interesting to note that the hostler Colosimo did not use any of the ways or methods suggested by petitioners in gaining his position on the tender of 1149 when it was stopped at the coal chute. (R. 82, 98, 99)

The case of *Mathews* v. *Daly West Mining Company*, 27 Utah 193, 75 Pac. 722, is illustrative of the proposition that the danger here was borne of the negligent act in starting the engines and not of the way pursued by respondent. In that case the plaintiff was an employee in an ore mill. The superintendent told him that the mill would be shut down for one-half hour and for plaintiff to look the machinery over while it was down. In making this check the plaintiff discovered a loose cap. He procured a candle and wrench and then laid crosswise over the belt in order to tighten the cap. While thus situated the mill was suddenly and unexpectdly started and the plaintiff injured. It was contended by the defendant that the safe method of tightening this cap was to lie down underneath the belt while someone else held a candle and that plaintiff thus could have tightened the cap without being exposed to danger, even though the mill was placed in operation while the task was being performed. The testimony, however, indicated that the method used by plaintiff, as well as the method suggested by appellant, was safe as long as the mill was not in operation. There was evidence that it was customary to give a warning when the mill was about to start and that

no such warning was given. Defendant contended that inasmuch as the plaintiff knew of each of the methods mentioned and knew that he could have tightened the loose cap with safety by lying prone underneath the belt, he was guilty of contributory negligence. The Court states:

> "They rely upon the well-settled rule of law that when the servant knows, or by the exercise of ordinary care can ascertain, that there are both safe and dangerous ways by which he can perform his duties, if he voluntarily chooses to pursue one of the ways that is dangerous, he assumes the natural and ordinary risk incident to the way he has chosen, * * *"

and continuing:

> "It is also well settled that the negligence of the master is not among the risks so assumed by the servant. Therefore when the servant, in the discharge of his duties, is in a position which is, under the conditions which then exist, naturally safe, but is suddenly made dangerous by the negligence of the master, and the injury to the servant is immediately caused thereby, the master is liable."

The Court observed that the position of plaintiff did not become dangerous until the mill was suddenly and unexpectedly started, and, in commenting on certain decisions cited by appellant, stated:

> "In neither of these cases was it shown, as in the case at bar, that the position of the servant, which before the accident was safe, was at the time of the injury suddenly made dangerous by the negligent act of the master. It is clear that these cases are not in point."

It clearly appears from the testimony that the way or method taken to gain a position on top of the tender is entirely up to the individual. Colosimo testified:

Q. And when the helper is in the cab he gets down on one side, from one gangway to the other?

A. Yes sir. Some of them—they have so many ways of working—some of them crawl up over the gates and get into them.

Q. It is more or less up to the helper what he does?

A. Yes sir.

Q. You do not pretend to tell the helpers how they should do this part of their work?

A. No sir.

Q. Nobody ever pretended to tell you how to do it when you were a helper?

A. No sir. (R. 99, 100)

Petitioners rely solely upon photographs of the two engines, Exhibits 3 (R. 62A), A (R. 34A) and F (R. 74A) to support their contention that respondent selected the most dangerous way of getting up on the tender of 1182, and from these exhibits without the aid of testimony they create these imaginary dangers. Certainly it does not appear from these photographs that the way chosen by respondent was either dangerous, clumsy or awkward. An examination of the exhibits discloses that there is a foot board on either side over the rails at the rear of the tender of 1182, and that above each foot board is a metal stirrup. For respondent to get to the top of the tender it was only necessary to do the following: Step onto the foot board at the north rear corner and grasp the hand hold which extends horizontally across the entire rear end of the tender approximately eight inches above the pin lifter, then place left foot in the iron stirrup immediately above the foot board; next, place the right foot and body weight upon the draw bar, and take hold of the ladder with either hand, the ladder being about two feet beyond the draw bar and immediately over the south rail. Finally, climb up the ladder to the top of the tender.

Petitioners refer to this method as crawling or clambering over the draw bar. It could much more fairly be described as a stepping from the foot board and stirrup onto the draw bar and thence to the ladder.

Petitioners make the statement on pages 12 and 13 of their brief that there is no horizontal hand hold across the rear of the tender of 1182. In view of Exhibits 3, A and F it is rather difficult for us to reconcile this assertion. The bar above the pin lifter extends completely across the back of the tender. What is its purpose? Without question it is a hand hold installed for use by workmen crossing over the draw bar.

The uncontradicted evidence is to the effect that it was common practice amongst petitioners' employees to pursue the course followed by respondent in passing over the draw bar to the ladder of 1182, under the circumstances disclosed by the record here. Respondent testified (R. 75-76):

> Q. I call your attention to the heavy iron rod, the top iron rod that runs above the pin lifter.
>
> A. Yes.
>
> Q. What do you use that for?
>
> A. It is to hold onto. We use them when we are out in the yards switching, to hold onto, when we are riding around. That is for the purpose of taking hold of it, with your hands.
>
> Q. You may state whether or not, in the course of your employment as a hostler, or a hostler's helper and fireman, you have occasion to cross from one side to the other of an engine coupled to a tender, and to pass over the drawbar?
>
> A. Yes, many times I have had occasion to. I did so many times. It is a common practice to get off and go up that way.

We submit that the way chosen by respondent was usual and safe, was one commonly taken, and that hand holds

were afforded for the entire course, but here again we suggest that it was not the way chosen which caused the injury, but the sudden, unexpected and negligent starting of the engines.

It is rather interesting to note that the railroad company was evidently unable to produce from among its vast number of employees any witness who would testify that the way pursued by respondent was unusual, awkward and dangerous, nor did the railroad make any attempt to prove the existence of any rule, regulation or instruction which prohibited such a movement or described it as unsafe or dangerous, and likewise petitioners failed to prove the existence of any custom or practice among its employees which in any way restricted employees from passing over the draw bar when their duties required them to move from one side of a coupled car or tender to another.

Respondent submits that the natural conclusion from this lack of evidence on the part of the defendant is that the movement is neither dangerous, awkward, clumsy or unusual, and in view of the fact that there is positive evidence to the effect that the movement is usual and common, petitioners' contentions to the contrary should be disregarded.

Four other possible routes are suggested by counsel. The first two are apparently suggested without having in mind the testimony of respondent:

> Q. In order for you to give any signal or communication whatsoever to the operator of an engine, where would you naturally get?
>
> A. I would get up on top of the tank, and in this particular instance in order to be where I should be in order to make the proper spot to take coal, *to be in a position for spotting and taking coal both, that is the proper place to be, for that move, up on the back end of the tank of 1182.* (R. 73)

There are, however, two complete answers to this contention: (1) The record does not disclose that any such order was ever given by Colosimo; and (2) the failure of Colosimo to anticipate the breach of such order, even if one had been given, did not in whole or in part cause the injuries sustained by respondent, and was never relied upon by respondent, his counsel or the Supreme Court of Utah as a ground of negligence in this case. Petitioners here merely set up a straw man.

The record clearly indicates that Colosimo never did order respondent to stay on engine 1182 in the sense that he was not to dismount from it. He only told respondent what to do, not how to do it. The complete record on this is as follows:

Colosimo on direct examination:

> Q. Now, will you state what was said between you and Mr. Bruner at that time?
>
> A. I told him that the back engine, 1149, was already sanded, and the 1182 needed to be sanded, and I told him to sand the 1182 and coal 1182 and I would coal 1149 as we went by the coal chute.
>
> Q. Was that all you said to him at that time?
>
> A. Yes, I believe so. I told him for him to sand 1182 and stay on her and coal her, and at the same time I would take care of the 1149. (R. 81)

On cross examination:

> Q. You never gave Mr. Bruner any instructions as to how he could get in and out of the engine, or what he should do, other than to work with you in this movement?
>
> A. No sir.
>
> Q. You never told Mr. Bruner how he should get down?

A. Down from the gangway onto the other?

Q. You did not tell him to go out of the window, up on top of the cab, on to the tender; you did not do that at all, did you?

A. No sir.

Q. The fact of the matter is, that was just up to him?

A. Yes sir. (R. 99)

On redirect examination:

Q. Mr. Colosimo, at the time you talked with Mr. Bruner, back at the cinder pit, about what you were going to do, did you say anything to Mr. Bruner as to where he should be and stay?

A. I just told him to stay on the 1182. That is what I told him, just to stay on the 1182, and I would take care of the 1149. (R. 102)

On recross examination:

Q. All you meant by that was that you would take care of 1149, and Bruner would take care of 1182?

A. Yes sir. (R. 102)

That this was the meaning conveyed to respondent is confirmed by his testimony:

He had come up to Engine 1182 and told me that I would have to take sand on the Engine 1182; that both engines needed coal, and he would coal on Engine 1149, and for me to take coal on 1182. (R. 31)

The Supreme Court of Utah on this point stated:

"Nor does the evidence show that Colosimo ordered the plaintiff to stay on Engine 1182. True Colosimo did testify that "I just told him to stay on 1182. That is what I told him, just to stay on 1182 and I would take care of 1149." But it is clear that what he meant

> by this was merely that plaintiff should confine his work to 1182 and Colosimo would take care of 1149; for in response to the question: "All you meant by that was that you would take care of 1149 and Bruner would take care of 1182?," Colosimo answered: "Yes, sir." This interpretation of this statement is further borne out by the remainder of Colosimo's testimony." (R. 106)

But let us assume that Colosimo ordered respondent not to dismount from Engine 1182 at any time. How can this aid the petitioners on the question of negligence imputed to them by the conduct of their servant Colosimo? The negligence plead and relied upon by respondent, and upon which this action is based, was the failure of Colosimo to give a warning that the engines were to be moved and his failure to hold the engines still until he received a proper signal from respondent. The duty violated by Colosimo, giving rise to the cause of action herein, was not the duty to anticipate what respondent would do or fail to do. It was the duty resting upon him to hold said engines still until he received a proper signal from respondent, and to give a proper warning before placing said engines in motion. It seems apparent that the sudden, unexpected movement of the engines under the circumstances disclosed by the record, was highly dangerous to respondent, and would have been dangerous to anyone working on the engines and not expecting or anticipating the movement.

Petitioners complain that respondent dismounted from Engine 1182, and contend that this was a dangerous act. May we suggest that if respondent had been off the engine when it started he would not have been injured. His injuries resulted from being on the engine when it was negligently placed in motion. Certainly any instruction given by Colosimo to respondent requiring respondent to take care

of 1182 while Colosimo did likewise with 1149 would not and should not relieve Colosimo of his duty to give proper warning and to hold said engines still until he received a proper signal from respondent. This admitted violation of duty on the part of Colosimo was relied upon by respondent and was relied upon by the Supreme Court of the State of Utah, and the existence of that duty and its breach by Colosimo is established by uncontradicted evidence.

It is interesting to note that the petitioners have never questioned the sufficiency of the proof to establish the existence of this duty and its violation by Colosimo, and have never contended that there was any evidence to the contrary.

The practice in the yards at Grand Junction was to move engines only on signal. The hostler's helper giving a signal by lantern which was then acknowledged by a whistle signal from the hostler. (R. 25, 26) Respondent testified that these signals were in effect at the time and place of the injury and that he "always used them and worked by them." (R. 26)

At the time the engines were moved from the cinder pits, respondent first gave a back up signal and Colosimo acknowledged this signal by whistle. The engines were stopped at the sand house by signal from respondent, and before the engines were moved a proper signal was given by him to Colosimo. This shows beyond any doubt that these two men were moving the engines by signal only, and that each was relying upon the signals. Colosimo not only placed the engines in motion without a signal from respondent and without giving any warning signal whatsoever, but also without knowing where or in what position respondent was at the time. Both respondent and Colosimo testified to the

foregoing facts. There is no dispute in the evidence. Could negligence be any more clearly established?

On the matter of petitioners' negligence, the Supreme Court of the State of Utah stated:

> "If the crew member operating an engine were to move it without signal from his co-worker when he knew the latter was engaged about the train at a point where he could not be seen, we might expect yard accidents to multiply greatly. There is also no dispute concerning the fact that Colosimo did not get a signal from his helper, the plaintiff, to back up so that 1182 could be coaled; nor did he give a whistle signal. It is also admitted that this sudden start caused the plaintiff to fall to the tracks. The hostler and his helper customarily moved the trains by signals between themselves. Colosimo started the train without either getting a signal from the plaintiff or giving a whistle or bell signal himself. It was dark and he could not see the plaintiff nor did he know where the plaintiff was. Moving the train under these circumstances was negligence even apart from the safety rules." (R. 110)

Subsequent to the decision of the Supreme Court of Utah in this case, this Honorable Court has had occasion to pass upon the question of negligence on the part of a railroad company arising from the violation of a company rule, providing that the bell must be rung "when an engine is about to move."

One of the rules relied upon by respondent here was the company's safety rule No. 30 which provided, in part, as follows:

> "The bell must be rung when an engine is about to move." * * * (R. 4)

In the case referred to *Tennant* v. *Peoria & Pekin Union R. Co.*, 88 L. Ed. Adv. Op. 322, decided January 17, 1944, this Court stated:

"As to the proof of negligence, the court below correctly held that it was sufficient to present a jury question. In view of respondent's own rule that a bell must be rung 'when an engine is about to move,' it was not unreasonable for the jury to conclude that the failure to ring the bell under these circumstances constituted negligence. This was not an operation where bell ringing might be termed unnecessary or indiscriminate as a matter of law. Cf. Aerketz v. Humphreys, 145 U. S. 418, 420, 36 L. Ed. 758, 759, 12 S. Ct. 835; Toledo, St. L. & W. R. Co. v. Allen, 276 U. S. 165, 171, 72 L. Ed. 513, 516, 48 S. Ct. 215. The engine had remainded stationary for several minutes, during which the engineer saw Tennant disappear in the direction of the subsequent engine movement. Still not knowing the precise whereabouts of Tennant, the engineer then caused the engine and cars to make an extended backward movement. Such a movement, without a warning, was clearly dangerous to life and limb."

Respondent believes that this decision substantially supports the decision of the Supreme Court of Utah in this case.

Certainly the jury had no fact question to pass upon. There was no controversy about the locomotives being stationary at the time plaintiff attempted to board 1182, nor the fact that the engines were placed in motion without a signal or warning. With only one inference and that of negligence on the part of Colosimo to be drawn from the undisputed facts in this situation, clearly, the trial Court and the Supreme Court of Utah committed no error in holding that the petitioners were guilty of negligence as matter of law.

Conclusion.

The petition for writ and the record are incomplete and insufficient.

This case involves no construction of a Federal Act. The decision of the Supreme Court of Utah was upon no new point of law. This is merely an ordinary action to recover damages for personal injuries and in which there is no dispute in the evidence and the negligence of petitioners and the lack of negligence of respondent is clearly established. The decision of the Supreme Court of Utah is not inconsistent with, but is in accord with the applicable decisions of the Supreme Court of the United States.

We respectfully submit that there are no grounds which justify the granting of the petition for a writ of certiorari in this case.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 41

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION, AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION,

Petitioners,

vs.

E. E. BRUNER,

Respondent.

BRIEF OF RESPONDENT

Opinion Below

The opinion of the Supreme Court of the State of Utah is not yet officially reported. It is unofficially reported in 142 Pac. (2d) 649. (Also at R. 103-117).

Jurisdiction

The judgment of the Supreme Court of the State of Utah was rendered October 25, 1943. (R. 117) Petition for re-

hearing was denied on December 27, 1943. (R. 117) Petition for writ of certiorari was filed on March 18, 1944, and was granted on May 1, 1944, 64 Sup. Ct. 1047. Jurisdiction, if present, must come from Section 237 of the Judicial Code as amended.

Statutes Involved

Federal Employers' Liability Act, (35 United States Statutes 65; U.S.C.A. Title 45, Sections 51, 53).

Statement of the Case

Respondent, a hostler's helper, in the employ of Petitioner railway company, while both were engaged in interstate commerce, in attempting to gain a position on top of the tender of one of Petitioners' engines at night (R. 33, 81) in the performance of his duties, was caused to be thrown from the rear of said tender onto the rails in front of its rolling wheels by a sudden and unexpected jerk and movement of two of Petitioners' engines (R. 42, 66, 68) and to thereby suffer the loss of his left leg below the knee. Respondent brought action against Petitioners under the Federal Employers' Liability Act to recover damages for the injuries thus sustained by him in the District Court of the Third Judicial District, in and for Salt Lake County, Utah, and following a trial to a jury, obtained a verdict and judgment in the sum of Thirty Thousand Dollars. Appellant's motion for a new trial was denied by the trial judge and upon appeal to the Supreme Court of the State of Utah, the judgment was affirmed. Petitioners, Defendants below, were charged with negligently and carelessly starting said locomotives without receiving a proper signal and without giving warning by ringing the bell or blowing the whistle, thus causing the injuries complained of. (R. 1 to 6) The Complaint set forth two rules governing the operation of

engines by Petitioners and their employees. (R. 4, 5) The Petitioners admitted in their answer the existence of these rules and that they were in force at the time of the accident. (R. 8) One of said rules, Section 30 of the rules and regulations of the operating department states:

> "The bell must be rung when an engine is about to move and while approaching and passing stations, tunnels, snow sheds and public crossings at grade."

The other, Section 2057 of the "Safety Rules", states:

> "An engine bell or whistle warning must be given before engines are moved. Then wait at least one minute."

Respondent testified with respect to his knowledge and the existence of these rules at the time of the accident. (R. 25, 26) Colosimo, the only one of Petitioners' witnesses whose testimony is preserved in the record, likewise testified that he was familiar with them. (R. 101) There was no evidence offered or received to the effect that these rules did not apply to the movement of the engines at the time and place of the accident resulting in Respondent's injury, nor was there any contention that Respondent and the hostler did not consider the rules to be binding on them while they were engaged in the performance of their duties at and prior to the time of the accident. In fact the uncontradicted evidence with respect to the custom and practice followed by hostlers and their helpers in the movement of engines in Petitioners' yards at Grand Junction established as a fact that these rules existed and were uniformly followed. (R. 23, 24 and 25)

In this respect the case at bar differs from *Owens vs. Union Pacific R. Co.*, 319 U. S. 715, 87 L. Ed. 1683, 63 S. Ct. 1271, and *Tennant vs. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 88 L. Ed. 322, 64 S. Ct. 409.

At the time Respondent was injured he was employed as a hostler's helper, aiding and assisting hostler Colosimo. (R. 27) It was the duty of the hostler and his helper to prepare engines for service and to deliver engines from roundhouse to road crews. The hostler is the boss. He runs the engine and sees that the fire and water supply are in proper condition. The helper coals, sands and waters engines, runs the turn table, throws switches and gives signals. (R. 91) The hostler depends on the helper for signals which control the movement of the engines, and in such movements both work together and depend upon each other. (R. 97)

On November 30, 1941, at 11 o'clock P. M., Colosimo and Respondent went to work. (R. 26) Both were experienced hostlers and hostler's helpers and had worked at both positions. (R. 22, 78, 97) It was dark and Respondent had supplied himself with an electric lantern with which to give signals during the hours of darkness. (R. 26) Prior to the accident, Respondent and Colosimo had removed engine No. 1149 from the roundhouse to the cinder pit. (R. 27) The track upon which the accident occurred runs generally east to west. (R. 29) The roundhouse is east of the cinder pits. West of the cinder pits along the same track and to the south is a sand house or sand tower, and further west along the track but to the south is the coal chute. (R. 29, 30)

While engine 1149 was at the cinder pits, engine 1182 was brought from the roundhouse and coupled onto it. Both engines were facing east, with the tender of No. 1182 coupled to the front of 1149. (R. 31) While the fire was being cleaned and built up in engine 1182, Respondent and Colosimo discussed the movements and the service to be given to said engines. (R. 31) Colosimo told Respondent that both engines would be moved by the power of 1149, that 1182 would be stopped at the sand house for sand and

that coal would be taken on both engines, that Bruner was to take care of the sanding and coaling of 1182 and that he, Colosimo, would coal 1149. (R. 31, 45, 50, 51, 70)

Petitioners state in various portions of their brief that Colosimo told Respondent to stay on engine No. 1182, meaning that he was not to dismount from the engine at all. (Brief 4, 8, 12, 22) This is an incorrect statement of the evidence. Respondent stated categorically that he was not instructed to stay on No. 1182 but that his instructions were to sand and coal No. 1182 and Colosimo would coal 1149. (R. 34, 70, 71) All of Colosimo's testimony with respect to this conversation is as follows:

> "Q. • • • Now, will you state what was said between you and Mr. Bruner at that time?
>
> A. I told him that the back engine, 1149, was already sanded, and the 1182 needed to be sanded, and I told him to sand the 1182 and coal 1182 and I would coal 1149 as we went by the coal chute.
>
> Q. Was that all you said to him at that time?
>
> A. Yes, I believe so, I told him for him to sand 1182 and stay on her and coal her, and at the same time I would take care of the 1149." (R. 81)
>
> "Q. (By Mr. Jensen) Mr. Colosimo, at the time you talked with Mr. Bruner, back at the cinder pit, about what you were going to do, did you say anything to Mr. Bruner as to where he should be and stay?
>
> A. I just told him to stay on the 1182. That is what I told him, just to stay on the 1182, and I would take care of the 1149.
>
> Recross Examination.
>
> Q. (By Mr. Black) All you meant by that was that you would take care of 1149, and Bruner would take care of 1182?
>
> A. Yes. sir." (R. 102)

Subsequent to the conversation above related and as soon as the fire had been cleaned, Respondent took a position on the right running board of 1182 and gave Colosimo, who was then in the cab of 1149, a back-up signal with lighted lantern. (R. 32) Colosimo sounded the whistle on 1149 to indicate that he had received the signal (R. 63, 82) and then started the engines backward. When the 1182 reached a point where its sand dome was underneath the sand spout, Respondent gave a stop signal with his lantern, and Colosimo in obedience to the signal stopped the engine. (R. 32) After sand had been taken on 1182, Respondent again gave a back-up signal with his lighted lantern, and Colosimo in response thereto backed the engines westward and stopped them when the 1149 reached a point where its tender was beneath the easterly apron of the coal chute. (R. 33) During this movement Colosimo was looking toward the west and not in the direction of Respondent. This was in accordance with the previous understanding between Respondent and Colosimo. Colosimo was solely responsible for this stop. (R. 34, 63) It is apparent that when this stop was made, the tender of 1182 was an engine length from the first apron at the coal chute. Colosimo proceeded to coal engine No. 1149, this operation taking three or four minutes. (R. 83) At about the time the engines stopped, Respondent entered the cab of engine 1182, checked the fire and water, and after letting the blower run a little bit to finish catching up the fire, turned it off, (R. 33, 60, 65) and this according to his right and duty. (R. 53, 91) It was Respondent's duty to be on the tender of No. 1182 when Colosimo was ready to move, so that he could give a back-up signal, and thereafter a stop signal when the tender of 1182 reached a point beneath the apron at the coal chute. (R. 34, 38, 44, 45) It was his duty to be there and Colosimo expected him to be there. (R. 100) In order to get to the top of the tender of No. 1182, Respondent

climbed out of the cab on the north side (the side away from the coal chute) and walked to the rear of the tender along the north side of the engine.

Respondent's Exhibit "A" (R. 34-A) and "F" (R. 74-A) are rear views of the tender of engine No. 1182. Appellants' Exhibit 3 (R. 62-A) is a picture of the tender of No. 1182 coupled to 1149. The rear end of the tender has attached to it a coupler and two-foot boards, one on either side. The familiar cutting levers extend from both sides of the tender to the couplers being attached to a wooden beam which protrudes approximately six or eight inches from the rear of the steel portion of the tender. Attached to this beam and running along the top of it is a hand-hold. Attached to the under portion of the beam at either end is a stirrup. Just above each foot-board there is a steel step attached to the beam to be used by employees in climbing onto the tender. (R. 75, 76) Attached to the steel portion of the tender and running from a point above the hand-hold to the top, approximately two feet in from the side of the tender, is a steel ladder. (See Exhibits "A", "F".) Respondent intended to climb up this ladder to the top of the tender. In order to do so and in accordance with the usual custom and practice, he climbed onto the wooden beam at the rear of the tender and was in the act of crossing over the coupler to the ladder, when Colosimo suddenly and without signal from the Respondent, and without warning by bell or whistle, and not knowing where or in what position Respondent was at that time started the engines. (R. 42, 82, 83, 89, 100, 101)

The resulting jerk threw Respondent onto the tracks and his left leg was run over at a point below the knee. (R. 41, 42, 43, 65, 69)

In Petitioners' Statement of Facts (Brief, p. 9) it is asserted that Respondent had several safe ways to get to

the top of the tender of 1182 to spot and coal it, without clambering over the draw bars or even dismounting from the engine; and that he did not avail himself of a safe course. It is argued that because of these facts Respondent was guilty of contributory negligence. All of the evidence in the record is to the effect that Respondent could climb to the top of the tender in any way that he saw fit, and that the way chosen by him was the usual, customary and proper way. With respect to the customary and usual manner of climbing to the top of the tender, Respondent testified as follows:

> "Q. You may state whether or not, in the course of your employment as a hostler, or a hostler's helper and fireman, you have occasion to cross from one side to the other of an engine coupled to a tender, and to pass over the drawbar?
>
> A. Yes, many times I have had occasion to. I did so many times. It is a common practice to get off and go up that way.
>
> Q. (By Mr. Black) Mr. Bruner, during the time that you were employed by the defendant corporation, did anyone ever give you any instructions concerning leaving or getting down from engines?
>
> A. No, sir." (R. 75, 76)

The only other testimony, (and the only witness to the facts produced by Petitioners) was that given by Colosimo. He testified that hostler's helpers had numerous ways of gaining positions on top of the tender, that some did it one way and some another. He testified that he never gave Respondent any instructions as to how he should get in and out of the engine or of the course he should pursue in gaining a position on top of the tender. He testified (R. 99):

"Q. The fact of the matter is, that was just up to him?

A. Yes, sir."

He further testified (R. 100):

"Q. It is more or less up to the helper what he does?

A. Yes, sir.

Q. You do not pretend to tell the helpers how they should do this part of their work?

A. No, sir.

Q. Nobody ever pretended to tell you how to do it when you were a helper?

A. No, sir."

There is no evidence in the record that the method adopted by Respondent to get to the top of the tender was dangerous or unusual or not customary. There was no evidence that petitioner had ever discouraged or forbidden the practice of crossing over draw bars by rule, regulation, custom or otherwise.

Petitioners conclude (Brief 4) from the fact that it was Respondent's duty to be in a position to give signals to Colosimo that he was required to remain on the right hand or south side of the engine. The signals referred to according to the evidence, were to be given by Respondent from a position on top and rear of the tender of 1182. (R. 44) There is an entire absence of evidence in the record to support the proposition that Bruner was required by circumstances, instruction, practice or rule to be or to remain on the south side of engine 1182.

Petitioner state (p. 4 of their brief) that there is no evidence, suggestion or contention in the record that

Colosimo knew that Respondent was between the engines or intended to go between them. That is true. The evidence is simply to the effect that Colosimo placed the engines in motion, well knowing that he did not know where Respondent was and well knowing that he had received no signal from him and well knowing that he had given no warning of his intended movement by bell, whistle or otherwise. The movement was made in the nighttime, and Colosimo, as he admitted, could see the top of the tender of 1182 from the cab of 1149 (R. 101), he therefore knew at the time the engines were moved that Respondent was not on the tender of 1182, otherwise he could have seen his light.

There was no conflict in the evidence on the question of Petitioners' negligence nor was there any evidence of Respondent's contributory negligence. However, at the conclusion of the introduction of evidence, the trial court submitted both these issues to the jury on proper instructions. In Instruction No. 3 (R. 123) the term "negligence" was fully and accurately defined. By Instruction No. 4 (R. 124) the jury was admonished that it was necessary for plaintiff to prove by preponderance of all the evidence that defendant was guilty of negligence, and that such negligence was the proximate cause of the injuries complained of. By Instruction No. 14-A (R. 127) the provisions of Section 53, Title 45, U. S. C. A., with respect to the diminution of damages by reason of contributory negligence was set forth and the jury was told that while contributory negligence would not defeat recovery, the damages might be diminished by the jury in proportion to the amount of negligence attributable to the injured employee. By Instruction No. 15 (R. 117) given in response to Petitioners' request No. 6 (R. 123), the jury was told that contributory negligence would not bar recovery but that the damages might be reduced in the event the jury found for plain-

tiff, in proportion to the amount of his negligence. There is a suggestion in the dissenting opinion of Justice Larsen (R. 116) that the jury was not adequately instructed on the definition of contributory negligence and that defendants' Requested Instruction No. 5 (R. 118) covering this point should have been given. This request, as a matter of fact, was given, and this request was a part of the charge submitted to the jury. The original request was marked "Given, George A. Faust, Judge." The record shows that no exception was taken by Petitioners for the refusal of the trial court to grant this request (R. 118, 129, 133) and no error was assigned in the Supreme Court of Utah for the failure or refusal of the trial court to grant this request (R. 133, 134, 135)

When the record on appeal reached the Supreme Court of Utah it was discovered that no instruction No. 5 was contained in the transcript of the proceedings. No attempt was made in that Court to correct the record in view of the fact that no exception had been taken and no error assigned for the failure or refusal of the court to grant or give this instruction.[6]

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[6] Under Utah practice the Supreme Court will not review alleged error in the refusal to grant requested instructions unless proper exception is taken thereto. Section 104-24-18, Utah Code Annotated, 1943, provides:

> "All instructions requested or given shall be filed by the clerk and shall become a part of the judgment roll. Exceptions to the charge or any portion thereof, or to the refusal or modification of any instruction requested, shall be taken at the time the charge is given, or before verdict. No reasons need be given for such exceptions, but the exceptions shall be noted upon the minutes of the court, or by the court reporter, if one is in attendance."

It was held in Hadra v. Utah Nat'l Bank, 9 Utah 412, 35 P. 508, that if no exception is taken either to the giving or the refusal to give instructions requested, no error can be assigned thereon.

See also Morgan v. Child, Cole & Co., 61 Utah 448, 213 P. 117, and Rule 61 of the Rules of Civil Procedure, 28 U.S.C.A. following Sec. 723-C.

The matter of contributory negligence was brought forcibly to the attention of the jury in the forms of verdict submitted by the trial court. By one of these forms (second verdict form) (R. 9) the jury was invited to consider and determine the existence, if any, and the comparative amount of negligence attributable to Respondent.

Under the circumstances the verdict returned by the jury amounted to a finding that Respondent was free from negligence on his part.

It is asserted in Petitioners' Statement of Facts, page 5 of their Brief, that the trial court improperly failed to instruct the jury to make proportionate deductions in damages if they found that Respondent was guilty of contributory negligence. In view of the fact that the Court gave the instruction on this subject as requested by Petitioners, namely instruction No. 15 (R. 117) it is difficult for us to understand or appreciate the virtue of this assertion.

Petitioners state with respect to the decision of the Supreme Court of Utah (Brief p. 7): "It held that the railroad was not entitled to a fair jury trial of those issues because it was not entitled to any jury trial of those issues." This statement is extravagant and misleading. There is nothing in the decision of the Supreme Court of Utah to justify such a statement. The Supreme Court of Utah had before it the record of a trial by jury, where the issues of negligence and contributory negligence had been submitted upon proper instructions and a determination made thereon. The Court held that Petitioners had had a fair jury trial and that the evidence without conflict demonstrated the existence of negligence on the part of Petitioners and that there was no evidence of negligence on the part of Respondent.

SUMMARY OF ARGUMENT

1. THIS COURT ON REVIEW HERE IS NOT LIMITED TO A DETERMINATION OF WHETHER OR NOT THE SUPREME COURT OF UTAH ASSIGNED CORRECT REASONS FOR ITS HOLDING BUT MAY LOOK TO THE ENTIRE RECORD TO DETERMINE THE VALIDITY OF THE JUDGMENT OF THE TRIAL COURT.

Under Point 1, Respondent contends that Petitioners' conception of the scope of the review in this Court is unduly limited. They seek to confine the review to a consideration of the reasons assigned by the Supreme Court of Utah as the basis for its judgment. It is well settled that a correct judgment will not be reversed because the lower Court's reasoning may have been erroneous in some particulars. Respondent contends that the complete record made at the trial court, being now before the Court, should be examined to determine whether or not Petitioners received a fair jury trial and if it should be so determined the judgment should be affirmed even though it may appear that the Supreme Court of Utah assigned erroneous reasons as the basis for its judgment.

2. PETITIONERS RECEIVED A FAIR AND IMPARTIAL TRIAL BY JURY UNDER THE PROVISIONS OF THE FEDERAL EMPLOYERS' LIABILITY ACT AND NO PREJUDICIAL ERROR RESULTED FROM INSTRUCTIONS GIVEN.

Under this point Respondent contends that Petitioners received a fair and impartial trial by jury on the issues raised by the pleadings. That the issues of negligence and contributory negligence were submitted to the jury on proper instructions. That the evidence which was not in conflict was in all respects sufficient to support the verdict.

That instruction No. 6 wherein the Court instructed the jury that Respondent had a right in attempting to mount the tender of engine No. 1182, to assume and to act upon the assumption that the hostler, Colosimo, would not place the engines in motion without proper signal from him nor without giving warning of his intention to move the engines by bell or whistle and that Respondent was justified in relying upon the hostler's obedience to Petitioners' safety rules, was under the pleadings and evidence entirely proper. That instructions No. 9 and 20 which covered the question of damage were not erroneous for the reason that they did not contain an admonition with respect to diminution of damages in the event the jury should determine that Respondent was himself contributorily negligent, in view of the evidence and other instructions covering this point.

3. THE SUPREME COURT OF UTAH CORRECTLY HELD AS MATTER OF LAW THAT RESPONDENT WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

Under this point Respondent contends that there is no evidence in the record which proves or tends to prove that he was guilty of negligence, which proximately contributed to the cause of his injuries and that the Supreme Court of Utah correctly held as matter of law that he was not guilty of contributory negligence.

4. THE SUPREME COURT OF UTAH CORRECTLY HELD THAT PETITIONERS WERE NEGLIGENT AS MATTER OF LAW.

Under this point Respondent contends that Petitioners' negligence was the sole, proximate cause of his injuries and that the Supreme Court of Utah correctly held that Petitioners were negligent as matter of law.

ARGUMENT

Point I.

THIS COURT ON THE REVIEW HERE IS NOT LIMITED TO A DETERMINATION OF WHETHER OR NOT THE SUPREME COURT OF UTAH ASSIGNED CORRECT REASONS FOR ITS HOLDING BUT MAY LOOK TO THE ENTIRE RECORD TO DETERMINE THE VALIDITY OF THE JUDGMENT OF THE TRIAL COURT.

Petitioners seek to limit the review in this case to a consideration of the question of whether or not the Supreme Court of Utah stated correct reasons for the affirmance of the judgment in favor of Respondent. While Respondent contends that the reasons given by the Supreme Court of Utah were correct, he also takes the position that the entire record should be considered and that the record clearly and conclusively establishes the validity of the judgment of the trial Court.

The Petitioners rely upon the case of *Owens vs. Union Pacific R. Co.*, 319 U. S. 715, 87 L. Ed. 683, 63 Sup. Ct. 1271, wherein this Court refrained from considering questions which the Circuit Court of Appeals had not determined. We submit, however, that this Court did not intend to thereby overrule the long line of decisions holding that the giving of a wrong reason for affirmance does not require reversal of a correct judgment. *Yazoo and M. Valley R. Co. vs. Mullins*, 249 U. S. 531, 63 L. Ed. 754, 39 Sup. Ct. 368; *Chicago R. I. and P. R. Co. vs. Wright*, 239 U. S. 548, 60 L. Ed. 431, 36 S. Ct. 185; *Helvering vs. Gowran*, 302 U. S. 238, 82 L. Ed. 224, 58 S. Ct. 154.

In *Yazoo and M. Valley R. Co. vs. Mullins*, supra, a case tried in a Mississippi State Court under the Federal Employers' Liability Act, the Defendant railroad requested a directed verdict on the ground that there was no evidence of negligence on its part. The request was refused and

verdict was for Plaintiff. Upon appeal, the State Supreme Court refused to consider the question of the sufficiency of the evidence of negligence and affirmed the judgment on the ground that the so-called "prima facie act" of Mississippi applied and relieved Plaintiff of the burden of establishing negligence. This Court had previously held that the "prima facie act" could not be applied under the Federal Employers' Liability Act. Upon writ of error to the Supreme Court of the United States, Plaintiff contended that even though the State Court erroneously applied the act, nevertheless the railroad had not been prejudiced by this error and that the reliance by the State Supreme Court upon the wrong reason should not prevent affirmance. In considering this contention, this Court stated at page 532 of 249 U. S.:

> "It is true generally in cases coming from lower Federal courts that the rendering of an erroneous decision on a particular question, * * * or the assignment by the lower court of an erroneous reason for a right decision, * * * will not entitle the complaining party to reversal, if it is clear that his rights were not prejudiced thereby. And this is likewise true of cases coming from state courts. * * * Whether the case comes from a state court or a Federal court, this court will, for the purpose of determining whether the error found may have been prejudicial, examine the whole record; state questions being left to the decision of the state court in cases coming here from those courts."

The judgment was, however, reversed because of clear error in an instruction.

In *Chicago R. I. and P. R. Co. vs. Wright,* supra, the trial court and, on appeal, the Supreme Court of Nebraska held that the case did not come within the Federal Employers' Liability Act but came within a state act. This court

held that the case came within the Federal Employers' Liability Act, but that the Defendant company had not been prejudiced by the erroneous holding of the state courts and the judgment for Plaintiff was affirmed.

In *Helvering vs. Gowran,* supra, this Court stated:

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. Frey & Son v. Cudahy Packing Co., 256 U. S. 208, 65 L. Ed. 892, 41 S. Ct. 451; United States vs. American R. Exp. Co., 265 U. S. 425, 68 L. Ed. 1087, 44 S. Ct. 569; United States vs. Holt State Bank, 270 U. S. 49, 56, 70 L. Ed. 465, 469, 46 S. Ct. 197; Langnes vs. Green, 282 U. S. 531, 75 L. Ed. 520, 51 S. Ct. 243; Stelos Co. vs. Hosiery Motor-Mend Corp., 295 U. S. 237, 239, 79 L. Ed. 1414, 1416, 55 S. Ct. 746; ct. United States vs. Williams, 278 U. S. 255, 73 L. Ed. 314."

In *Security and Exchange Commission vs. Chenery Corp.,* 318 U. S. 80, 87 L. Ed. 626, 63 Sup. Ct. 454, this Court in confining its review of the judgment to the validity of the grounds upon which the commission based its action pointed out that it did not thereby intend to disturb the well settled rule announced by the foregoing decisions. This Court stated the reason for the rule as follows:

> "The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate."

While it does not appear from the opinion in the Owens case, supra, why this Court refrained from going into matters not reached or decided by the Circuit Court of Appeals

it may well have been that Respondent there did not demand or request review of the entire record.

As pointed out by this Court in *Indiana Farmers' Guide Publishing Co. vs. Prarie Farmers' Publishing Co.*, 293 U. S. 268, 79 L. Ed. 356, 55 S. Ct. 182, Respondent must show that although based on untenable grounds the judgment below is correct and should be affirmed, and that this Court in the absence of any such claim will not examine the record to discover grounds upon which to sustain it. Respondent submits that conceding, for the sake of argument only, erroneous reasons were given as the basis for its judgment by the Supreme Court of Utah, nevertheless the judgment is correct in its final analysis and should be affirmed.

Respondent will contend here as he did to the Superme Court of Utah that the judgment of the trial court is correct and that no error was committed in the instructions and further that if there was any error in the instructions, it was not prejudicial for the reason that the evidence established the negligence of petitioners as a matter of law and that there was no evidence of contributory negligence on the part of Respondent.

Respondent respectfully requests an examination and consideration of the whole record to determine whether or not the judgment in favor of Plaintiff was and is correct and that the review here not be limited to a consideration of the opinion of the Supreme Court of Utah only.

Point II.

PETITIONERS RECEIVED A FAIR AND IMPARTIAL TRIAL BY JURY UNDER THE PROVISIONS OF THE FEDERAL EMPLOYERS' LIABILITY ACT AND NO PREJUDICIAL ERROR RESULTED FROM INSTRUCTIONS GIVEN.

The Petitioners contended in the Supreme Court of Utah (R. 133, 134, 135), and likewise here that they did not receive a fair jury trial because of certain claimed errors in Instructions 6, 9 and 20. As heretofore pointed out, the right of Respondent to recover under the evidence was established without conflict and there was an entire absence of proof of negligence on the part of Respondent. These issues, however, were submitted to and determined by the jury, on proper instructions, adversely to the Petitioners, thus leaving for determination the sole question as to whether or not prejudicial error resulted from instructions Nos. 6, 9 and 20. If no prejudicial error was committed in these instructions, then Petitioners' argument that they did not have a fair trial must fall of its own weight.

a. *Instruction No. 6 was in all respects a correct statement of the law as applied to the facts in this case.*

Instruction No. 6 may be found at pages 10 and 11 of the record. By this instruction the jury was told that Respondent had a right in attempting to gain a position on top of the tender of 1182, where his duty required him to be, to assume that Colosimo, his fellow employee, would not place the engines in motion before receiving a signal from Respondent or before giving warning by bell or whistle of the intended movement. The jury was also told that Respondent was not bound to anticipate a violation of Petitioners' safety rules by Colosimo.

Petitioners' complaint respecting this instruction can be summarized as follows: (1) The instruction absolved Respondent from the duty of exercising due care for his own protection. (2) The two rules were not applicable to yard movements. (3) The instruction assumes that Respondent came within the protection of said rules and regulations. (4) The jury was told that a disregard of these rules constituted negligence per se.

Petitioners by answer admitted the existence of the rules and that they were in full force at the time of the accident. Respondent and Colosimo were familiar with these rules and understood them at the time of the accident. The fact that the uniform custom and practice established by Petitioners and their employees of moving engines upon signal and after giving warning of the movement by bell or whistle establishes that these rules had been promulgated for the safety of employees operating engines within yard limits.

Colosimo testified that when a hostler and his helper work together at night, the hostler operates the engine upon signals from the helper, that both work together and depend upon each other. (R. 97) Respondent testified that the helper gives the signals and does the ground work and the hostler operates the engine. He testified that there was a custom and practice followed by the hostlers and hostlers' helpers during all of the time he was employed by Petitioners, that engines were to be moved by the hostler only upon signal from the helper and that after the helper gave the signal, the hostler would answer back by whistle or bell to give warning of the intended movement. (R. 24)

Respondent also testified:

> "Q. Do you know whether or not these signals, both from the hostler to the helper and the helper to the hostler, were used in the movements of engines in the yards at Grand Junction during the time you were working there?
>
> A. Yes, they were in effect, I always used them and worked by them.
>
> Q. Prior to the time this accident occurred, do you recall any occasion when the signals were not used?
>
> A. No, I do not. I always worked according to signals, that is what we have to move by, is signals." (R. 25)

Up to the time of the accident these rules had been faithfully observed by Colosimo, as is indicated by his own testimony, as well as that of Respondent.

Petitioners in defending the proposition that Instruction No. 6 absolved Respondent from the duty of exercising due care must necessarily take the position that Respondent as a matter of right could not rely upon Colosimo to obey the rules and follow the custom, but should have governed his conduct on the assumption that Colosimo might do otherwise.

Railroading is necessarily hazardous. The greatest protection employees have comes from the strict observance of rules, customs and practices designed to promote safety. Employees working together in the movements of engines or trains must be protected by standards of care upon which they can rely. Rules and customs are the means by which these standards are created. The adoption of a rule or custom that signals must be given before engines or trains are moved constitutes a standard which employees may anticipate will be followed. Railroad employees in the performance of their duties must rely for their own safety upon fellow employees and must act upon the assumption that the ordinary hazards of railroading will not be increased by violations of standards established for the expeditious and safe movement of trains, engines and railroad equipment. If railroad employees could not act upon the assumption that fellow employees will not violate these standards, it would be impossible to perform and carry on the great public service of railroading.

Colosimo, except for the time when the engines were stopped at the coal chute immediately prior to the accident, was in the cab of egine 1149. His position was safe and he could not be placed in danger by anything which Respondent could have done or failed to do in the performance

of his duty. Respondent, on the other hand, was moving about on engine 1182 and was giving proper signals not only for the purpose of accomplishing the results outlined to him by Colosimo, but also for the purpose of preserving his own well-being. It was necessary for Respondent to depend upon Colosimo for safety. Colosimo depended upon Respondent for signals and assistance, while Respondent depended upon Colosimo for protection against dangers which might result from failure to observe the standards of care set up by the rules, custom and practice. Respondent was safe and free from danger until Colosimo suddenly, unexpectedly and in violation of the rules placed the engines in motion.

The Supreme Court of Utah in discussing this matter stated (R. 107):

> "This is a case where the parties were members of a working crew working on signals designed for the very safety of that work. Where the accident has been caused by the failure to give such signal the party working in a crew responsible for such omission will not be heard to say that the injury suffered could have been avoided had the injured party conducted himself on the assumption that the signal would not be given; that the consequences of the delict could have been avoided had the injured party, as appears from hindsight, so conducted or positioned himself as to make the delict inconsequential. There are perhaps few instances of accidents in industry where one party injured by the negligence of another might not, had he been warned of the negligence, have placed himself in more advantageous position to avoid its consequences. One of the criteria in determining the standard of care required in industry to fend off a defense of contributory negligence is not one fashioned by the imagination of judges sitting in their chambers but one measured by the conduct and practices of the average experienced workman engaged in that indus-

try in relation to others working with him in their immediate joint enterprise under the system of signals designed for the safety of such parties engaged in the enterprise. The care which a prudent person will exercise not to injure others and that which he will exercise in order to protect himself from the uncontemplated action of others are not necessarily governed by the same circumstances. One for whose benefit such signal is to be given, may while in the conduct of the enterprise, rely on the other to give it; and the latter may not, where the other has acted according to the standard set by the accustomed behavior under such mutual undertakings, urge that greater care would have avoided the consequences of his omission to give the signal."

To instruct that Respondent could assume that the rules, regulations and customs would be followed and obeyed by Colosimo obviously does not take the question of contributory negligence from the jury. The instruction told the jury that, as matter of law, Respondent had a right to rely upon obedience to these standards. In it no reference was made to the conduct of Respondent before, during or after he started to mount the tender of 1182. The instruction merely states that in making the attempt to pass over the couplers and up the ladder to the top of 1182, it was not necessary for Respondent to take precautionary measures to guard himself from danger which could arise only as the result of Colosimo's failure to obey the rules, regulations and customs.

The authorities cited by Petitioners at page 35 of their Brief in support of their contention that Instruction No. 6 absolved Respondent from the duty of exercising due care for his own protection are not in point. None of these cases arose under the Federal Employers' Liability Act, none of them involve railroading or fellow employee relationship,

nor do they relate to any situation even remotely similar to that presented by the record here.

The decisions from state and federal courts in cases arising under the Federal Employers' Liability Act unanimously support the proposition that employees are entitled to rely upon rules and customs which determine the standards of what they must anticipate in the performance of their duties and that they are entitled to act in reliance thereon. *Tennant vs. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 88 L. Ed. 322, 64 S. Ct. 409; *Kurn vs. Stanfield*, 111 Fed. (2d) 469 (8th Circuit 1940); *Gildner vs. Baltimore and O. R. Co.*, 90 Fed. (2d) 635 (2nd Circuit); *McClellan vs. Penn. R. Co.*, 62 Fed. (2d) 61, (2nd Circuit); *Wyatt vs. New York O. & W. R. Co.*, 45 Fed. (2d) 705 (2nd Circuit); *Lehi V. R. Co. vs. Doktor*, 290 Fed. 760 (3rd Circuit); *MacDonnell vs. Southern Pacific Co.*, 17 Cal. App. (2d) 432, 62 Pac. (2d) 201, certiorari denied, 301 U. S. 688, 81 L. Ed. 1345, 75 S. Ct. 790; *O'Donnell vs. B. & O. R. Co.*, 324 Mo. 1097, 26 S. W. (2d) 929; *Grosvener vs. New York Central R. Co.*, 343 Mo. 611, 123 S. W. (2d) 173; *Pierce vs. Spokane International Ry. Co.*, 131 Pac. (2d) 139, 15 Wash. (2d) 142; *Pacheco vs. New York N. H. and H. R. Co.*, 15 Fed. (2d) 467 (2nd Circuit); *Missouri K. and T. Ry. Co. vs. Barber* (Texas), 163 S. W. 116; *McGhee vs. Willis*, 134 Ala. 281, 32 So. 301; *Roenfranz vs. Chicago R. I. and P. Ry. Co.*, 140 Iowa 33, 116 N. W. 714; *Grosee vs. Terminal R. Assn. of St. Louis*, 307 Ill. App. 414, 29 N. E. (2d) 1018; *Atlantic Coast Line R. Co. v. McIntosh*, 114 Fla. 356, 198 So. 92 (1940); *Easter vs. Virginian R. Co.*, 76 W. Va. 383, 86 S. E. 37.

It has been held by respectable authority that a person is justified in assuming that he will not be exposed to danger which can come only from a breach of duty owed him by another. *St. Louis & S. F. Ry. Co. vs. Jeffries*, 276 F. 73

(C.C.A. 8, 1921); *Beck vs. Sirota,* 42 Cal. App. (2d) 551, 109 Pac. (2d) 419 (1941); *Hechler vs. McDonnell,* 42 Cal. App. (2d) 515, 109 Pac. (2d) 426; *Grimes vs. Richfield Oil Company,* 106 Cal. App. 416, 289 Pac. 245 (1930); *Sanders vs. City of Long Beach,* 54 Cal. App. (2d) 651, 129 P. (2d) 511.

This Court, in cases involving assumption of risk, has recognized the right of employees of railroads to rely upon fellow employees exercising ordinary care and following customary methods in the performance of their work. *Chicago R. I. and P. Ry. Co. vs. Ward,* 252 U. S. 18, 64 L. Ed. 430, 40 S. Ct. 275; *Chesapeake and Ohio Ry. Co. vs. DeAtley,* 241 U. S. 310, 60 L. Ed. 1016, 36 S. Ct. 564; *Chesapeake and Ohio Ry. Co. vs. Proffitt,* 241 U. S. 462, 60 L. Ed. 1102, 36 S. Ct. 620. In *Chicago R. I and P. R. Co. vs. Ward,* supra, the Court stated:

> "In the absence of notice to the contrary, and the record shows none, Ward had the right to act upon the belief that the usual method would be followed and the cars cut off at the proper time by the engine foreman, so that he might safely proceed to perform his duty as a switchman by setting the brake to check the cars which should have been detached."

Petitioners maintain that Instruction No. 6 is erroneous for the reason that Rules 30 and 2057 were not applicable to yard movements. The language of the rules without more is proof of the fact that they were enacted for the safety of employees engaged in movements of this type and there is no evidence to the contrary in the record. This contention disregards the uncontradicted evidence that these rules were understood and relied upon by Respondent and Colosimo in the movement of the engines prior to the time

Respondent was injured and that they had become a matter of custom and practice among Petitioners' employees in the yards at Grand Junction. If it be a fact that these rules were not applicable to movements of this type certainly no one was in a better position to prove and establish the fact than the railroad company, and they offered no such proof. As far as the record goes, they leave the rules with the admission in their Answer that they were in full force and effect at the time of the accident. The trial Court in Instruction No. 6 merely advised the jury that Respondent could rely upon rules and regulations pertaining to the movement of engines, and safety of its employees, in force at the time.

Under the pleadings and evidence in this case a finding by the jury that these rules were not applicable to movements of the type being carried on by Respondent and Colosimo at the time of the accident, would be set aside as not supported by pleadings or proof.

Petitioners argue that Respondent was not within the protection of the rule because of the way he chose to get onto the tender of engine 1182.

Respondent's choice of methods in moving from the cab of 1182 to the top of its tender was not a causative factor in the accident; its sole proximate cause was Colosimo's negligence. Certainly there was nothing in the conduct of Respondent which would take from him the protection of these rules and regulations. The rule which required hostlers to hold engines still until receipt of a proper signal from the helper was a rule adopted for the protection of the helper, it affords no protection to the hostler. The rule which required hostlers to give warning by bell or whistle

of intended movements was not adopted for the protection of the hostler, but for the protection and safety of fellow employees and others who might be endangered by the movement. Respondent's safety while on or about the engines, depended on his knowing when the engines were to be moved and he depended upon the signals designed for that purpose to obtain that information. The rules and customs determined and established what those signals and warnings should be.

Petitioners' final criticism of the instruction is that by it the Court told the jury that a disregard of the two rules above referred to by Petitioners would constitute negligence per se. This argument is, to say the least, rather far-fetched. If the instruction were, as a matter of fact, subject to such a criticism, it would not be erroneous here because no prejudicial error could result therefrom. This instruction merely informed the jury that Respondent had a right to rely upon the observance of the rules. It is an instruction which deals solely with the matter of Respondent's right to act on the assumption that his fellow employee would observe the rules and do his duty. It does not state and cannot be construed to state that a mere violation of these rules by Colosimo would entitle Respondent to a verdict.

We respectfully submit that Instruction No. 6 correctly stated the law as applied to this case, that it is well supported by the authorities, and that the trial court did not err in so instructing the jury.

b. *Instructions Nos. 9 and 20 were correct statements of the law as applied to the facts of this case and were not inconsistent with other instructions.*

Petitioners complain of instructions Nos. 9 and 20 (R. 11 and 12) on the ground that the same were given without

any qualification as to deduction on account of Respondent's contributory negligence. Assuming that there was evidence of contributory negligence, the jury was instructed that after they determined the amount of the damage sustained the amount awarded was to be reduced in proportion to the negligence attributable to Respondent. (See instructions 14-A, R. 127; and 15, R. 117, given in response to Defendant's request for Instruction No. 6, R. 123.) These instructions clearly qualify and supplement Instructions No. 9 and No. 20 and when read with the latter instructions embody a correct statement of the law of damages under the Federal Employers' Liability Act.

Petitioners endeavor to circumvent this obvious point by asserting that the instructions given on this subject are contradictory. *Sorenson, et al., vs. Bell,* 51 Utah 262, 170 Pac. 72; *State vs. Waid,* 92 Utah 297, 67 Pac. (2d) 647; and *Konold vs. Rio Grande Western Ry. Co.,* 21 Utah 379, 60 Pac. 1021, cited by Petitioners hold that instructions on a material issue which are inconsistent or contradictory should not be given because it is impossible after the verdict to ascertain which instructions the jury followed or of the influence the erroneous instructions had on their deliberations. There can be no doubt about the correctness of the rule but there can equally be no doubt as to its inapplicability to the instructions complained of in this case.

The instructions given by the trial Court could not possibly have mislead the jury as they correctly stated the law and were neither contradictory nor inconsistent. It is elementary that the law need not be contained in one instruction and that instructions must be read as a whole.

A contention similar to Petitioners' was made in regard to instructions on damages given in the case of *State vs.*

Trimble, 263 S. W. 840, 304 Mo. 533 (Cert. Denied 45 Supreme Court 354, 267 U. S. 598, 60 L. Ed. 806) which was an action under the Federal Employers' Liability Act by a dependent mother to recover damages for the death of her son. The trial Court by Instruction No. 3 told the jury that if they found certain facts required in order to render a verdict for plaintiff, they should assess her damages at such sum as would reasonably compensate her for the loss of pecuniary benefits. Instruction No. 2 directed the jury to make recovery bear the same ratio to full damages as defendant's negligence bore to the full negligence. In holding that the instructions were not contradictory, the Court said:

> "Further, instruction 3 does not authorize a verdict. The two instructions taken together define, somewhat awkwardly, but correctly, the duty of the jury. It must first ascertain how much the plaintiff is damaged, and then deduct from the sum found an amount in the proportion that the negligence of the deceased contributed to the death. If the first is not found, there would be no basis whereon to make the deduction. Instruction 3, instead of authorizing a verdict only directs the jury what it must take into consideration in assessing her damages. There can be no complaint that the direction in that respect is not correct. The jury must consider all those elements and assess the damages accordingly. It is a strained construction to say they must then and there fix the amount of the verdict without considering anything else. One of the meanings of 'assess,' given in Webster and in Bouvier, is 'to value,' 'to fix the value of.' If the words, 'you may ascertain as damages,' were used instead of 'you may assess as damages,' there would be no complaint. If

> miscroscopic inaccuracies like that complained of should work a reversal in every case, no case could be affirmed."

Respondent's position here is supported by *Bucher vs. Equitable Life Assurance Society of the United States*, 91 Utah 179, 63 Pac. (2d) 604; *Barlow vs. Salt Lake & U. R. Co.*, 57 Utah 312, 194 Pac. 665; and *Kamer vs. Missouri-Kansas-Texas R. Co.*, 326 Mo. 792, 32 S. W. (2d) 1075.

It is respectfully submitted that the instructions given by the trial Court were not inconsistent or contradictory but when read as a whole contained a correct statement of the law applicable to the issues and that the cases cited by Petitioners on pages 28, 36 and 37 of their Brief are not in point.

It is elementary that error to justify reversal be prejudicial to the rights of appellant or petitioner. *Johnston vs. Jones*, 66 U. S. 209, 17 L. Ed. 117; *Deery vs. Cray*, 72 U. S. 795, 5 Wall 795, 18 L. Ed. 653; *Decatur Bank vs. St. Louis Bank*, 88 U. S. 294, 21 Wall 294, 22 L. Ed. 560. Section 104-14-7, Utah Code Annotated, 1943, provides that only such errors as effect the substantial rights of the parties can be relied upon for a reversal of a judgment. Section 104-39-3, Utah Code Annotated, 1943, provides that no exceptions shall be regarded unless the decision excepted to is material and prejudicial to the substantial rights of the party excepting. If there were any errors in the instructions given in this case, they are not such as effect the substantial rights of the petitioners and hence could not furnish a basis for reversal of the judgment in favor of Respondent. *Ogden Commission Co. vs. Campbell*, 66 Utah 563, 244 P. 1029; *Boyd vs. San Pedro, L. A. & S. L. R. Co.*, 45 Utah 449, 146 P. 282.

Point III.

THE SUPREME COURT OF UTAH CORRECTLY HELD AS MATTER OF LAW THAT RESPONDENT WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

By Petitioners' specification of errors and argument the decision of the Supreme Court of Utah is attacked on the grounds that the Court erred in holding as matter of law that Respondent was not guilty of contributory negligence and that as matter of law Petitioners were guilty of negligence. They address themselves but incidentally to the fundamental question of whether or not they received a fair jury trial in the trial Court. Petitioners have never contended that the issues of negligence and contributory negligence were not submitted to and determined by the jury, nor have they ever asserted or maintaind that the evidence was insufficient to support the verdict and judgment.

On this point they content themselves by arguing (1) that by Instructions Nos. 6, 9, and 20, Respondent was absolved from contributory negligence; and (2) that by Instruction No. 6 the jury was told that as a matter of law the two safety rules applied to yard movements and that a violation of the rules was negligence per se.

While Respondent has argued (1) that Instructions 6, 9, and 20 were in all respects proper and correctly stated the law as applied to the facts of this case and that the Rules No. 2057 and 30 under the pleadings and evidence applied to yard movements and that Respondent came within their protection, he now contends and submits that the decision of the Utah Court is not erroneous and that its holdings on the matters of contributory negligence and negligence are correct under the pleadings and facts of this case.

Petitioners base their contention that the Supreme Court of Utah erred in holding that there was no evidence of Respondent's contributory negligence on four grounds. We shall discuss them in the order presented by Petitioners in their Brief.

1. *Respondent did not choose an unnecessarily hazardous method of proceeding from the cab of Engine 1182 to the tender.*

There is no evidence in the record that the method adopted by Respondent to get to the top of the tender of 1182 was dangerous or unusual or not customary. Respondent testified at R. 76 that he had crossed over the draw-bars between engines coupled on many occasions and that it was common practice to get off and go up that way. There was no evidence to the contrary and no attempt was made to discredit this testimony. In support of their argument, Petitioners rely upon Exhibits 3 (R. 62A), A (R. 34A), and F (R. 74A). From this silent testimony, Petitioners vigorously contend that the way finally selected by Respondent to accomplish his purpose was dangerous, hazardous, and fraught with great difficulties.

These exhibits speak for themselves. It appears from them that there is a foot board on either side of the draw-bar at the rear of the tender of 1182 and that above each foot board is a metal stirrup. That a hand hold extends horizontally across the rear end of the tender some eight inches above the pin lifter. Respondent at the time of his injury was a young, vigorous railroader. He had been railroading since 1929. (R. 17) For him to mount the tender following the course chosen, it was merely necessary to step onto the foot board at the north rear corner, grasp the hand-hold, above referred to, place left foot in the iron stirrup immediately above the foot board, place right foot and body weight upon the draw bar or beam and take hold of the

ladder with either hand, the ladder being about two feet beyond the draw bar and immediately over the south rail and finally climb up the ladder to the top of the tender. Certainly this does not involve acrobatic skill nor uncommon strength, timing or agility, nor does it involve any difficulties which any man who could qualify for employment as a hostler or hostler's helper could not do with ease. We submit that the extreme difficulties and hazards described by Petitioners in discussing this movement are purely imaginary and do not exist as facts. The Record gives them no support. It is evidently the opinion of Petitioners' counsel that this movement, described as *clammering* over the draw bar, is awkward, clumsy and dangerous, but we doubt that this opinion would find support amongst men whose employment require them to work on and about trains and engines. They were evidently unable to find, amongst their vast number of employees, any who would so testify.

Petitioners suggest a person attempting to cross over the draw bars as Respondent did would be almost certain to fall whether the engines moved or not. From what experience on their part, or from what evidence in the Record, they draw this conclusion we do not know. If such a method of crossing from one side of a train to another or of crossing between engines coupled involves the hazards and difficulties described by Petitioners, it is most remarkable that rules, regulations, or instructions have not been long since adopted forbidding or discouraging employees from doing this. Petitioners made no attempt to prove the existence of any such rules, regulations or instructions and we, therefore, naturally assume that no such rules, regulations or customs exist. In the trial, Petitioners were willing to leave this issue with the jury on Respondent's uncontradicted testimony which appears at R. 75, 76.

Petitioners suggest that the Supreme Court of Utah ignored the preliminary fact that Respondent dismounted from 1182 on the north side and walked back to the rear of the tender before attempting to cross over the draw bar to the ladder. It is difficult to perceive how this fact could be considered as negligence on the part of Respondent in view of the undisputed evidence that he had a free right of choice as to the manner of accomplishing his purpose. (R. 100) It is suggested that there was no reason for Respondent to be on the north side of the engine or at the rear of the north side of the tender. There was a very good reason. It was his duty to mount the tender for the purpose of signalling Colosimo for the next movement. He was in the performance of his duty from the very moment he dismounted from the engine until injured.

Petitioners suggest that there were four safe ways which Respondent could have pursued to accomplish his purpose other than the one he attempted, all of which were safe. This, of course, is but a conclusion based on afterthought and, as pointed out by the Supreme Court of Utah, is not supported by any facts or testimony appearing in the Record.

It is suggested that he could have moved straight back from the cab, climbing up the coal gate of the tender, which is directly back of the gangway, and that this was the most direct and easiest way of reaching his objective. There was no testimony in the Record describing this method, except Colosimo's statement (R. 100) "Some of them crawl up over the gates and get into them". What effort would have been necessary to climb up the coal gate is left to speculation. How the coal gate is constructed, whether or not there are handholds, whether or not there was any particular practice or any particular reason why Respondent should have chosen this method must be determined by guess. Cer-

tainly there is no evidence that Colosimo ever instructed Respondent to use this or any other method or ever intended that he should chose any particular course in getting onto the tender of the 1182.

It is also argued that Respondent could have moved from the cab through the door onto the running board, thence to the top of the boiler, then over the top of the cab to the top of the tender. It would be interesting to know what Petitioners' position would be here if Respondent had pursued this method and the engines had been suddenly placed in motion while he was on top of the engine cab. That he would have been injured or killed under such circumstances is almost a matter of certainty. Since Respondent started from within the cab, this would have been an unusual way to mount the tender, Colosimo stated that this was the usual way only in a case when the hostler's helper was on the running board at the beginning and not when the helper was in the cab at that time. (R. 99, 100) Speaking of this method, Petitioners say that while it was circuitous, it did not involve dismounting from the engine. Wherein Respondent's act in dismounting from the engine contributed in any way to the cause of his injuries does not appear.

It is next suggested that Respondent could have dismounted from the engine on the south side, walked back along the south side of the engine to the ladder, and climbed the ladder to the tender. Petitioners say, "This was not as easy as the first or second methods but it did not involve dismounting from the engine on the wrong side and the crawling over the draw bar." (Br. 15)

What is there in the Record to support the statement that this method *was not as easy* as any other method used or suggested? This likewise is but a speculative assump-

tion. Petitioners recommend this method because it did not involve dismounting on the *wrong side* of the engine. It seems that no one except Petitioners' counsel has determined which was the wrong and which the right side of the engine. If we are to indulge in speculations not supported by evidence it might be well suggested that Respondent thought it safer to dismount from the engine on the side away from the coal chute. The exhibits relied on by Petitioners show that there was no ladder on the south side of the engine. The ladder was at the rear of the tender and between the engines. So long as the choice was up to him, and so long as he was not in violation of any rule, custom or instruction, and was in the faithful discharge of his duties, a court would not be justified in finding, without benefit of testimony or proof, that Respondent dismounted from the "wrong side" of the engine or that he did wrong in any other way or respect in his efforts to gain a position from which to carry on his work.

The fourth method mentioned by Petitioners was that followed by Respondent.

Finally Petitioners suggest that after reaching the rear of the tender on the north side he had a perfectly safe way of crossing over. This was to mount the step on the north side of the pilot of engine 1149, step up to the pilot deck, take hold of the circular handhold, cross the deck, step down to the footstep on the south side, step across the south footstep at the rear of the tender of 1182 and climb up the ladder at the rear of 1182.

This movement, of course, involved as much difficulty, required as much strength and agility as crossing over the draw bar, but nevertheless Petitioners, because they find support in this suggestion, make it appear that this was a movement which could be made without difficulty or danger.

Granted that he could have done this, it is submitted he would have been placed in exactly the same danger from a sudden movement as he was when upon the rear of the tender of No. 1182.

While there was some testimony with respect to routes one and two, there was no testimony whatsoever with respect to suggested routes three and five. Any of these ways could have been used by Respondent to gain his desired position, but wherein any of them are more safe or less dangerous, awkward, or clumsy than the route taken by him does not appear.

The principal difficulty with Petitioners' argument is that it is based upon false assumptions and from these false premises, they conclude that Respondent adopted a hazardous way when safe ways were available.

Respondent submits that there is no inherent danger in any of the methods suggested by Petitioners nor in the method used by him, that any vigorous workman who could pass the required physical examination for employment as a hostler or hostler's helper could get on top of the tender by using any of the methods without difficulty or danger to himself as long as the locomotives remained still, but that such a person using any of these methods would be placed in grave danger and peril and perhaps grievously injured or killed if the locomotives were suddenly, unexpectedly and without warning placed in motion while he was so engaged. It clearly appears that the danger and hazard here did not result from the method used but was the direct result of the violation of duty on the part of Colosimo.

The case of *Mathews vs. Daly West Mining Company*, 27 Utah 193, 75 Pac. 722, is illustrative of the proposition that the danger here was born of the negligent act in start-

ing the engines and not of the way pursued by Respondent. In that case the Plaintiff was an employee in an ore mill. The superintendent told him that the mill would be shut down for one half hour and for Plaintiff to look the machinery over while it was down. In making this check, the Plaintiff discovered a loose cap. He procured a candle and a wrench and then laid crosswise over the belt in order to tighten the cap. While thus situated, the mill was suddenly and unexpectedly started and the Plaintiff injured. It was contended by the Defendant that the safe method of tightening this cap was to lie down underneath the belt while someone else held a candle and that Plaintiff thus could have tightened the cap without being exposed to danger, even though the mill was placed in operation while the task was being performed. The testimony, however, indicated that the method used by Plaintiff as well as the method suggested by Appellant was safe as long as the mill was not in operation. There was evidence that it was customary to give a warning when the mill was about to start and that no such warning was given. Defendant contended that inasmuch as the Plaintiff knew of each of the methods mentioned and knew that he could have tightened the loose cap with safety by lying prone underneath the belt, he was guilty of contributory negligence. The Court states:

> "They rely upon the well-settled rule of law that when the servant knows, or by the exercise of ordinary care can ascertain, that there are both safe and dangerous ways by which he can perform his duties, if he voluntarily chooses to pursue one of the ways that is dangerous, he assumes the natural and ordinary risk incident to the way he has chosen, * * *"

and continuing:

> "It is also well settled that the negligence of the master is not among the risks so assumed by the servant.

> Therefore when the servant, in the discharge of his duties, is in a position which is, under the conditions which then exist, naturally safe, but is suddenly made dangerous by the negligence of the master, and the injury to the servant is immediately caused thereby, the master is liable."

The Court observed that the position of Plaintiff did not become dangerous until the mill was suddenly and unexpectedly started and in commenting on certain decisions cited by the Defendant therein, including *Fritz vs. the Salt Lake and Ogden Gas and Electric Light Company,* 18 Utah 493, 56 Pac. 90, which is cited by Petitioners stated:

> "In neither of these cases was it shown, as in the case at bar, that the position of the servant, which before the accident was safe, was at the time of the injury suddenly made dangerous by the negligent act of the master. It is clear that these cases are not in point."

The cases cited by Petitioners on Page 16 of their Brief have no application here for the reason that Respondent did not choose a dangerous way of performing his duties and for the further reason that the way he chose had no causal connection with the injuries he received. We respectfully submit that there is no evidence showing that the route chosen by Respondent was hazardous or that in making his choice, he violated any duty, custom, rule or instruction. The evidence conclusively establishes that the route chosen by him did not cause or contribute to the cause of the injuries he received.

On this point the Supreme Court of Utah (R. 106) properly found and held:

> "There is no testimony tending to show that it was more dangerous to mount the tender in the manner chosen by the plaintiff. Defendants apparently rely

on Exhibit 3 which is a picture of these two engines coupled together. This picture shows the draw bar and other items relating to the hand holds, etc., on the route which the plaintiff chose. However, we cannot from this picture conclude that the manner chosen was highly dangerous and a method not customarily used. The evidence merely shows that there were several ways by which the plaintiff could have gotten on top of the tender. The manner in which he was to get there was left to his own judgment. The record does not show that the way he chose was the most dangerous way."

2. *Respondent's choice of ways was not in violation of his duty to be in position to give signals to Colosimo.*

Commencing at page 20 of their Brief, Petitioners argue that Respondent violated his duty which required him to be in a proper place to pass signals to Colosimo. Inasmuch as Colosimo moved the engines without signal of any kind from Respondent, it is difficult to understand the virtue of this contention. It was Colosimo's duty to hold the engines still until he received a signal. This he did not do. The movement following the coaling of 1149 was to be made upon signal from Respondent to Colosimo according to the testimony here and of course that signal was to be passed at a time after Respondent reached the top of tender of 1182 and not before. No contention has ever been made that Respondent was slow or that he used an undue amount of time in performance of his duty. No contention is made that it was understood that he was to give the signals from any other position except from the top of the tender. No reasonable contention can be made that there existed any fact or circumstance which justified Colosimo in moving the locomotives without signal, nor that anything which Respondent did or failed to do with reference to the

discharge of his duties in any way justified Colosimo in violating his duty to Respondent.

There is no evidence in this record that it was Respondent's duty to remain in sight to Colosimo. How or in what manner this argument of Petitioners could support the proposition that Respondent not having been on top of the tender to give the signal at the time the engines were placed in motion had any causal connection with the injuries complained of by him does not appear either from Petitioners' argument nor from the Record.

3. *There is no evidence that Respondent disregarded the instructions of Colosimo in getting off Engine 1182.*

On this point the Supreme Court of Utah (R. 106) stated:

> "Nor does the evidence show that Colosimo ordered the plaintiff to stay on Engine 1182. True Colosimo did testify that 'I just told him to stay on 1182. That is what I told him, just to stay on 1182, and I would take care of the 1149'. But it is clear that what he meant by this was merely that plaintiff should confine his work to 1182 and Colosimo would take care of 1149; for in response to the question: 'All you meant by that was that you would take care of 1149 and Bruner would take care of 1182?', Colosimo answered: 'Yes, sir.' This interpretation of this statement is further borne out by the remainder of Colosimo's testimony."

The Supreme Court of Utah properly held that no ininstruction was ever given by Colosimo to Respondent which required him to remain on 1182 in the sense that he was not to dismount therefrom. There was no occasion for such an instruction and the statement made by Colosimo to Respondent was not understood by Colosimo as containing such a direction and Respondent denied that

any such requirement was ever made of him, and a finding to that effect by the Supreme Court of Utah is certainly not erroneous under the undisputed facts.

4. *Respondent failed to inform Colosimo that he was going to cross over the draw bars between engines 1182 and 1149.*

Respondent doubts Petitioners' sincerity in making the argument under their Proposition 4. We are wondering whether or not they would still make such contention if Colosimo and Respondent had been working on a long train. Would counsel expect Respondent to walk, say, twenty or thirty or forty car lengths to inform the engineer or the person operating the engine that he was going to cross over the draw bars? Would any principle of law or justice require such notification as a condition precedent to the establishment of Respondent's discharge of duty to exercise due care? The answer seems self-evident. No rule, custom or practice required Respondent to give such a notice and there is no evidence that Colosimo ever expected any such notice.

We submit that the Supreme Court of Utah correctly held and determined that there was no evidence of Respondent's contributory negligence.

Point IV.

THE SUPREME COURT OF UTAH CORRECTLY HELD THAT PETITIONERS WERE NEGLIGENT AS MATTER OF LAW.

In Point II of their argument, Petitioners complain that the trial Court in Instruction No. 6 told the jury that Respondent had the right to presume and act upon the presumption that Colosimo would obey and not violate rules 2057 and 30, that the instruction was erroneous because the rules were inapplicable. The instruction was given in con-

nection with the pleadings and the evidence offered by the parties.

As heretofore pointed out in detail, the promulgation of the rules and the fact that they were in force at the time of the accident was admitted by Petitioners in their answer. These admissions were unqualified. Respondent and Colosimo, the only employees of the Petitioners who testified with respect to these rules, admitted their familiarity with them. It conclusively appears from evidence in which there is no conflict, that these employees with one exception (the movement made by Colosimo causing Respondent's injuries), fashioned their conduct in the performance of their duty upon these rules and customs which embodied them.

No contention was made in the trial Court by Petitioners that the rules were not applicable to these movements or that they did not govern and pertain to the duties of Respondent and Colosimo. There being no conflict in pleadings or proof on this point the Court was justified in holding as matter of law that the rules applied to yard movements and afforded protection to Respondent. *Union Pacific Ry. Co. vs. McDonald*, 152 U. S. 262, 38 L. Ed. 434, 14 S. Ct. 619; *Baltimore & P. R. Co. vs. Mackey*, 157 U. S. 72, 39 L. Ed. 624, 15 S. Ct. 491; *Choctaw O. & G. R. Co. vs. Holloway*, 191 U. S. 334, 48 L. Ed. 207, 24 S. Ct. 102; and *Brady vs. Southern R. Co.*, 320 U. S. 476, 88 L. Ed. 189, 64 S. Ct. 232.

Petitioners contend that it was possible for the jury to find that Colosimo instructed Respondent to stay on Engine 1182, that it was his duty to obey and that under such circumstances it cannot be said as matter of law that Colosimo owed Respondent the duty to anticipate that he, Respondent, would disobey that order and the failure of Colosimo to so anticipate does not constitute negligence. The proposition thus advanced is entirely moot inasmuch as any question of negligence based on Colosimo's failure to anticipate what Respondent might or might not do was not pleaded by Re-

spondent nor submitted to the jury by the trial Court. In this argument, Petitioners entirely overlook the undisputed fact that the matter of Petitioners' negligence as charged by Respondent was submitted to the jury upon proper instructions and determined by it. Petitioners have never questioned, and so far as we know do not now question, the sufficiency of the evidence to support the jury's finding to the effect that they were negligent as charged.

There are, however, two complete answers to this contention: (1) The record does not disclose that any such order was ever given by Colosimo; and (2) the failure of Colosimo to anticipate the breach of such order even if one had been given, did not in whole or in part cause the injuries sustained by Respondent and was never relied upon by Respondent, his counsel or the Supreme Court of Utah as a ground of negligence in this case.

Colosimo never did order Respondent to stay on Engine 1182 in the sense that he was not to dismount from it. He only told Respondent what to do, not how to do it. Respondent testified (R. 71):

> "A. That is correct. He just told me the work that had to be done. He did not tell me how to do it."

Colosimo testified on cross examination (R. 99):

> "Q. You never gave Mr. Bruner any instructions as to how he could get in and out of the engine, or what he should do, other than to work with you in this movement?
>
> A. No sir.
>
> Q. You never told Mr. Bruner how he should get down?
>
> A. Down from the gangway onto the other?
>
> Q. You did not tell him to go out of the window,

up on top of the cab, on to the tender; you did not do that at all, did you?

A. No sir.

Q. The fact of the matter is, that was just up to him?

A. Yes, sir."

But let us assume that Colosimo ordered Respondent not to dismount from Engine 1182 at any time. How can this aid the Petitioners on the question of negligence imputed to them by the conduct of their servant Colosimo? The negligence pleaded and relied upon by Respondent, and upon which this action is based, was the failure of Colosimo to give a warning that the engines were to be moved and his failure to hold the engines still until he received a proper signal from Respondent. It was the violation of that duty which gave rise to the cause of action here, it was not the violation of the duty to anticipate what Respondent would do or fail to do. The sudden, unexpected movement of the engines under the circumstances disclosed by the Record, was highly dangerous to Respondent and would have been dangerous to anyone working on or about the engines not expecting or anticipating the movement.

Petitioners complain that Respondent dismounted from Engine 1182 and contend that this was a dangerous act. May we suggest that if Respondent had been off the engine when it started he would not have been injured. His injuries resulted from being on the engine when it was negligently placed in motion. Certainly any instruction given by Colosimo to Respondent requiring him to take care of 1182 while Colosimo did likewise with 1149 would not and should not relieve Colosimo of his duty to give proper warning and to hold said engine still until he received a proper signal from Respondent. This admitted violation of duty on the part of Colosimo was relied upon by Respondent and was

relied upon by the Supreme Court of the State of Utah, and the existence of that duty and its breach by Colosimo is established by evidence not in conflict.

Petitioners suggest that inasmuch as it was Respondent's duty to be in a position to pass signals to Colosimo and that Respondent could not perform that duty while on the north side of the engine, his act in dismounting from the cab of 1182 and walking back to the rear of its tender on the north side thereof preliminary to passing over the draw-bars to the ladder and thence to the top of the tender was in violation of his duty and therefore amounted to negligence on his part, not to be anticipated by Colosimo.

This presents the question as to when and from what position Respondent's duty required him to pass the next signal. As disclosed by the evidence, it was necessary for him to be on the top of the tender of 1182 to pass the signal and to stop the movement of the engines by signal when the tender reached a point beneath the apron at the coal chute. (R. 44, 73) It was never intended that he should perform any of these duties from any other position except the top of the tender. It was never intended that he should pass these signals from the ground, from the cab of 1182, or from the ladder, or from any other position whatsoever except the top and Colosimo knew full well that Respondent was not on the top of the tender when he placed the engines in motion because the top of the tender was in the range of his vision and he knew that he could not see any person, or any lighted lantern thereon. (R. 100)

As the Supreme Court of Utah held, Petitioners' argument on this point is not supported by any evidence in the Record nor by any reasonable inference drawn therefrom.

From the time these engines were moved from the cinder pit up until the time they were placed in motion without

warning or signal by Colosimo, the rules and custom had been followed, the engines had been moved upon signal only and both Respondent and Colosimo had relied and depended upon each other and upon signals and warning. Colosimo, nevertheless, not only placed the engines in motion without a signal from Respondent and without giving any warning whatsoever, but without knowing where or in what position Respondent was at the time. There being no dispute in the evidence, could negligence be any more clearly established?

On this point the Supreme Court of the State of Utah stated (R. 110):

> "If the crew member operating an engine were to move it without signal from his co-worker when he knew the latter was engaged about the train at a point where he could not be seen, we might expect yard accidents to multiply greatly. There is also no dispute concerning the fact that Colosimo did not get a signal from his helper, the plaintiff, to back up so that 1182 could be coaled; nor did he give a whistle signal. It is also admitted that this sudden start caused the plaintiff to fall to the tracks. The hostler and his helper customarily moved the trains by signals between themselves. Colosimo started the train without either getting a signal from the plaintiff or giving a whistle or bell signal himself. It was dark and he could not see the plaintiff nor did he know where the plaintiff was. Moving the train under these circumstances was negligence even apart from the safety rules."

This Court in the case of *Tennant vs. Peoria & Pekin Union R. Co.*, supra, has held that such a movement without a warning is clearly dangerous to life and limb. Accord: *C. & O. Ry. vs. Proffitt*, 241 U. S. 462, 60 L. Ed. 1102, 36 S. Ct. 620, wherein the Court stated:

> "To subject an employee, without warning, to unusual

> dangers in movement incident to the employment is itself an act of negligence."

Petitioners seem to take the position that it was necessary for them to be able to anticipate the precise nature of Respondent's position and danger before they could be held liable for the injuries he received. There need be no such anticipation and the case of *Virginian Ry. Co. vs. Stanton,* 84 Fed. (2d) 133, cited by Petitioners in their brief illustrates this point. In that case the Plaintiff attempted to step out from between two cars when they were unexpectedly put in motion. His right leg caught on a spike or sliver on the rail and his foot was so injured that it was necessary to amputate it. The Court stated:

> "The particular accident which happened in this case was doubtless unusual; but liability is not dependent upon a prevision of the precise event. It is sufficient if some injury may be reasonably expected, unless precaution is taken."

CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court of Utah affirming judgment of the trial Court in favor of respondent should be affirmed.

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No. 41. McCarthy et al., Trustees of the Denver & Rio Grande Western Railroad Co., et al. *v.* Bruner. Certiorari, 322 U. S. 718, to the Supreme Court of Utah. Argued October 19, 1944. Decided November 13, 1944. *Per Curiam:* In this case, certiorari was granted upon a petition which urged that the Utah Supreme Court erred in affirming a judgment for the respondent upon the ground that a verdict could have been directed for respondent

upon the issues of negligence and contributory negligence. On oral argument and submission, it appears that these contentions are not decisive of the case, since the issues of negligence and contributory negligence were in fact submitted to the jury, and since petitioners' contentions, made after the granting of certiorari, that the trial court erred in instructing or failing to instruct the jury on these issues, are either insubstantial or not properly raised on the record. The writ of certiorari is therefore dismissed as improvidently granted. *Mr. W. Q. Van Cott*, with whom *Mr. P. T. Farnsworth, Jr.* was on the brief, for petitioners. *Mr. Parnell Black*, with whom *Messrs. Calvin W. Rawlings* and *Harold E. Wallace* were on the brief, for respondent. Reported below: 105 Utah 399, 142 P. 2d 649.